TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1902~~. 1903.

No. ~~325~~. 91.

THE PEOPLE OF THE STATE OF NEW YORK ON THE RELATION OF THE PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ERASTUS C. KNIGHT, COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED JULY 22, 1902.

(18,613.)

(18,613.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 385.

THE PEOPLE OF THE STATE OF NEW YORK ON THE RELATION OF THE PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ERASTUS C. KNIGHT, COMPTROLLER OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 28, 1902.

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UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

he President of the United States of America to the honorable the judges of the supreme court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of e judgment of a plea which is in the said Supreme Court on a mittitur from the court of appeals of the State of New York, before u, or some of you, being the highest court of law or equity of the id State in which a decision could be had in the said suit between he People of the State of New York on the relation of the Penn-lvania Railroad Company, relator, and Erastus C. Knight, comp-oller of the State of New York, defendant, wherein was drawn in uestion the validity of a treaty or statute of, or an authority exer-sed under, the United States, and the decision was against their lidity, or wherein was drawn in question the validity of a statute , or an authority exercised under, said State, on the ground of eir being repugnant to the Constitution, treaties, or laws of the nited States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against e title, right, privilege, or exemption specially set up or claimed nder such clause of the said Constitution, treaty, statute, or com-ission; a manifest error hath happened to the great damage of the id relator as by its complaint appears. We being willing that ror, if any hath been, should be duly corrected, and full and speedy stice done to the parties aforesaid in this behalf, do command you, judgment be therein given, that then under your seal, distinctly d openly, you send the record and proceedings aforesaid, with all ings concerning the same, to the Supreme Court of the United ates, together with this writ, so that you have the same in the said preme Court at Washington, within 30 days from the date hereof, at the record and proceedings aforesaid being inspected, the said preme Court may cause further to be done therein to correct that ror, what of right, and according to the laws and customs of the nited States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the nited States, the 11th day of July, in the year of our Lord one ousand nine hundred and two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Original. Albany county, N. Y. Clerk's office. led Jul- 18 1902

1—385

c UNITED STATES OF AMERICA, *ss:*

To Erastus C. Knight, comptroller of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of New York, wherein The People of the State of New York upon the relation of the Pennsylvania Railroad Company plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph McKenna, associate justice of the Supreme Court of the United States, this 11th day of July, in the year of our Lord one thousand nine hundred and two.

JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

d [Endorsed:] Personal service admitted July 18" 1902. John C. Davies, att'y gen'l, att'y for def't the comptroller. Orig. Albany county, N. Y. Clerk's office. Filed Jul- 18 1902

e Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 10th day of June in the year of our Lord one thousand nine hundred and two, before the judge of said court.

Witness, the Hon. Alton B. Parker, chief judge presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur June 11th 1902.

f THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* PENNSYLvania Railroad Company, Relator, Appellant,
ag'st
ERASTUS C. KNIGHT, as Comptroller of the State of New York, Respondent.

Be it remembered that on the 4th day of March in the year of our Lord one thousand nine hundred and two Pennsylvania Railroad Company, relator, the appellant in this proceeding came here into the court of appeals, by Robinson, Biddle and Ward, its attorney-, and filed in the said court a notice of appeal and return thereto from the order of the appellate division of the supreme court in and for the third judicial department. And Erastus C. Knight, as comptroller, &c., the respondent in said proceeding afterwards appeared in said court of appeals by John C. Davies attorney general, his attorney.

Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

g Whereupon, the said court of appeals having heard this proceeding argued by Mr. Henry Galbraith Ward, of counsel for the appellant, and by Mr. Henry B. Coman, deputy attorney general, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the appellate division of the supreme court appealed from herein be, and the same hereby is affirmed with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

h Therefore, it is considered that the said order be, and the same hereby is, affirmed, with costs, as aforesaid.

And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *June 11th*, 1902.

I hereby certify, that the *preceding* record contains a correct transcript of the proceedings in said proceeding in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] W. H. SHANKLAND, *Clerk.*

i In the Court of Appeals of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* PENNSYLVANIA Railroad Company, Relator, Appellant,
against
ERASTUS C. KNIGHT, as Comptroller of the State of New York, Defendant, Respondent.

Papers on Appeal.

Robinson, Biddle & Ward, attorneys for relator, appellant, 160 Broadway, N. Y. city.

John C. Davies, attorney general, attorney for defendant, respondent, Albany, N. Y.

Filed March 4th, 1902.

Rec'd June 21st, 1902, Albany county, N. Y.

Filed June 21st, 1902.

1 *Notice of Motion.*

Supreme Court of the State of New York.

In the Matter of the Application of THE PENNSYLVANIA RAILROAD COMPANY for a Writ of Certiorari, to be Directed to Erastus C. Knight, as Comptroller of the State of New York.

You will please take notice, that on the petition of Pennsylvania Railroad Company, verified the 28th day of May, 1901, and the undertaking of the United States Fidelity & Guaranty Company, executed the 27th day of May, 1901, and approved by Honorable James A. O'Gorman, a justice of the supreme court, on the 28th day of May, 1901, and duly filed with the comptroller, on the 29th day of May, 1901, in the amount approved by said justice of the supreme court, to the effect that, if the writ applied for is dismissed, or the determination of the comptroller affirmed, the petitioner herein will pay all costs and charges which may accrue against it in the prosecution of the said writ, including the cost of all appeals, copies of both of which are herewith served upon you, this
2 court will be moved, at a special term thereof, to be held at the city hall, in the city of Albany, on the 8th day of June, 1901, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an order directing a writ of certiorari to go to Erastus C. Knight, as comptroller of the State of New York, directing him to return the accounts and all the evidence before him on the application for a reduction of the tax mentioned in the petition, and all the papers and proofs upon the original statement of such account and all proceedings thereon, to the end that the said determination of the comptroller may be reviewed and such disposition made as of right and justice should be made, and for such other and further relief as may be just and equitable.

Dated May 29th, 1901.

ROBINSON, BIDDLE & WARD,
Attorneys for Petitioner, 160 *Broadway*,
Borough of Manhattan, New York.

To Honorable Erastus C. Knight, comptroller of the State of New York.

3 *Undertaking.*

Supreme Court of the State of New York.

In the Matter of the Application of THE PENNSYLVANIA RAILROAD COMPANY for a Writ of Certiorari, to be Directed to Erastus C. Knight, as Comptroller of the State of New York.

Whereas, on or about the 8th day of May, 1901, the comptroller of the State of New York, did refuse to make any revision or readjustment of a certain account for taxes previously settled by him against the Pennsylvania Railroad Company for the four years ending October 31st, 1900, assumed to be levied under and by virtue of chapter 908 of the Laws of 1896; and

Whereas, the Pennsylvania Railroad Company is dissatisfied with the said taxation and proposes to review the same by a writ of certiorari;

Now, therefore, the undersigned, the United States Fidelity and Guaranty Company, pursuant to the statute in such case made and provided, does hereby undertake that if the writ of certiorari which may be granted on the application of said Pennsylvania Railroad Company to review the said determination of said comptroller be vacated, and the determination of the said comptroller sustained, the said Pennsylvania Railroad Company, the applicant for
4 said writ, will pay all costs and charges which may accrue against the said company in the prosecution of said writ, including costs on all appeals to any and all courts not exceeding the sum of $500.

Dated May 27th, 1901.

THE UNITED STATES FIDELITY AND GUARANTY CO.,
By SYLVESTER J. O'SULLIVAN, *Manager.*

Attest: G. TERRY SINCLAIR,
Attorney-in-Fact.

STATE OF NEW YORK, }
County of New York, } *ss:*

On the 27th day of May, in the year 1901, before me personally came Sylvester J. O'Sullivan, to me known, who, being by me duly sworn, did depose and say, that he resided in the city of New York; that he was manager of the United States Fidelity and Guaranty Company, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, of chapter 720, of the Session Laws of the State of New York, for the Year 1893. And the said Sylvester J. O'Sullivan further said that he was acquainted with G. Terry Sinclair, and knew him to be the attorney-in-fact of said company; that the signature of said G. Terry Sinclair, subscribed to the within instrument, is in the genuine handwriting of said G. Terry Sinclair, and was subscribed thereto by like order of the board of directors, and in the presence of him, the said Sylvester J. O'Sullivan.

CHAS. W. YOUNG,
Commissioner of Deeds, New York City.

5 At a regular meeting of the board of directors of the United States Fidelity and Guaranty Company, duly called and held on the fourteenth day of January, A. D. 1901, at the office of the company, city of Baltimore, State of Maryland, a quorum being present, on motion it was unanimously

Resolved: That Andrew Freedman, vice-president, or Sylvester J.

O'Sullivan, manager, or G. Terry Sinclair or Wyllys Benedict, attorneys-in-fact of this company in the State of New York, be, and they hereby are, and each one of them is, authorized and empowered to execute and deliver and attach the seal of the company to any and all bonds and undertakings for or on behalf of the company in its business of guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law required; such bonds and undertakings, however, to be attested in every instance by one other of the persons named as occasion may require.

STATE OF NEW YORK, }
County of New York, } ss.:

I, G. Terry Sinclair, attorney-in-fact of the United States Fidelity and Guaranty Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of the said company, and do hereby certify that the same is a true and correct transcript therefrom and of the whole of said original resolution.

Given under my hand and the seal of the company, at
[SEAL.] the city of New York, this 27th day of May, 1901.

G. TERRY SINCLAIR,
Attorney-in-fact.

6 *Statement of the United States Fidelity and Guaranty Company at the Close of Business, December* 31, *A. D.* 1900.

Assets.

Investments, stocks and bonds (market value)	$878,015 75
Loans on collateral	789,650 00
Cash on hand and in banks	266,740 52
Real estate	138,467 04
Loans on mortgage	300 00
Mortgages and other collateral taken account salvage	51,659 39
Agents' balances, less commissions fidelity and surety departments	162,902 92
Agents' balances, less commissions burglary department	9,852 94
Due for subscriptions to department guaranteed attorneys	24,673 32
Interest due and accrued	16,445 36
	$2,338,707 24

Liabilities.

Capital stock paid in cash		$1,500,000 00
Cash deposited as collateral for risks		82,174 41
Surplus and reserve	$794,032 83	
Less dividend payable January 10, 1901	37,500 00	
		756,532 83
		$2,338,707 24

STATE OF NEW YORK, } ss:
County of New York, }

G. Terry Sinclair, being duly sworn, says that he is the attorney-in-fact of the United States Fidelity and Guaranty Company,
7 and that, to the best of his knowledge and belief, the foregoing is a true and correct statement of the financial condition of said company, as of December 31st, 1900.

G. TERRY SINCLAIR.

Subscribed and sworn to before me this 27th day of May, 1901.

CHAS. W. YOUNG,
Commissioner of Deeds, New York City.

(Endorsed:) "Supreme court of the State of New York.—In the matter of the application of the Penna. R. R. Co. for a writ of certiorari, etc.—Copy. Undertaking on application for writ of certiorari. Approval and notice of filing. Robinson, Biddle & Ward, att'ys for petitioner, No. 160 Broadway, borough of Manhattan, New York city. The within undertaking is this day approved. Dated May 28th, 1901. J. A. O'Gorman, justice of the supreme court of the State of New York."

8 *Petition.*

Supreme Court of the State of New York, County of Albany.

In the Matter of the Application of THE PENNSYLVANIA RAILROAD COMPANY for a Writ of Certiorari, to be Directed to Erastus C. Knight, as Comptroller of the State of New York.

To the honorable the supreme court of the State of New York:

The petition of the Pennsylvania Railroad Company respectfully represents, upon information and belief:

That it is a corporation duly created by and existing under the laws of the State of Pennsylvania and is a common carrier of passengers and merchandise to and from the city of New York, through, into and across the States of New Jersey, Pennsylvania, Delaware and Maryland, and by means of connecting lines of railroad through many of the western States of the Union. The company's terminus in New Jersey is at Jersey City, and by means of its ferry-boats running regularly from Jersey City to Cortlandt street, Desbrosses street and 23d street, North river, New York city, it lands passengers and their baggage at those points.

9 For the purpose of increasing its business your petitioner established, May 6th, 1897, a cab stand on its own premises at the 23d Street ferry, where it now maintains a service of 55 cabs and 4 coaches under special licenses from the city of New York whereby they can stand on those premises only. The sole business done by these cabs is to bring your petitioner's passengers to and from the 23d Street ferry, and they cannot be availed of by any one else. The cab service is incidental to and a part of your petitioner's business of interstate commerce and is of no value whatever except as a part thereof, because it is and always has been, separately considered, carried on at a loss.

It is true that the charge for cabs is separate from the charge for the balance of the passenger's transportation, but this is necessary from the nature of things. It would be impossible for your petitioner to include in its railroad and ferry tickets the price of the cab service, first, because, as the price would vary in amount in every case according to the distance the passenger is carried, an infinity of tickets would have to be provided; and, second, because passengers buying railroad tickets to New York do not know whether they will employ a cab or not, and in respect to passengers starting from New York for points without the United States it would be impossible to supply drivers of cabs with tickets for sale to such points.

No endeavor was made by the State comptroller to assess or collect any tax from your petitioner upon this cab service until the autumn of the year 1900, when he applied to your petitioner for a statement of the gross receipts and gross expenses of the said service from May 16th, 1897, to June 30th, 1900, and also for the value of the horses and vehicles employed during that time, and for
10 the value of any real estate used by your petitioner in the city of New York in connection with the said service.

Your petitioner thereupon caused full and detailed answers to be made to these questions, in an affidavit verified by John P. Green, vice-president of your petitioner, on the 29th day of September, 1900, and delivered to and filed with W. B. Atterbury, Esq., commissioner for the comptroller, at his office 257 Broadway, New York city, October 10, 1900, a copy of which affidavit is hereunto annexed, marked Exhibit A.

Thereupon, subsequently, upon the said affidavit and upon no other information, so far as your petitioner knows, the comptroller assessed a tax of which he advised your petitioner on or about the first day of December, 1900, of $934.07 on your petitioner's franchise or business based on the gross earnings of the said cab service in the State of New York for four years ending October 31st, 1900, and of $1,422.54 on the franchise or business based on the value of your petitioner's capital stock employed in the State of New York for the same period. Copies of the said assessments and accounts accompanying the same are hereunto annexed, marked Exhibits B, C, D and E.

Your petitioner was advised that it was not subject to taxation in respect to its cab service under the tax laws of the State of New York, chapter 908, laws of 1896, and acts amendatory thereof, because the said laws lay a tax upon the franchise or right to do business in the State of New York, which is invalid as to your petitioner's business, being interstate commerce, under sec. 1, article 8, subd. 3, of the Constitution of the United States.

On the 26th day of December, 1900, your petitioner applied to the comptroller for a rehearing to revise and readjust the said tax account, which application was granted by the comptroller on
11 the 4th day of January, 1901, and he subsequently appointed the 14th day of February, 1901, at 2.30 p. m., for the said rehearing at his office in the city of Albany, New York.

At the said rehearing the affidavit of John P. Green, which is Exhibit A, hereto annexed, and the circular of your petitioner's cab service, Exhibit F, hereto annexed, were offered and received in evidence, and the following admission was made:

"It is conceded that the receipts of the Pennsylvania Railroad Company for its cab service, included in the basis of this tax, are only for the transportation service either from its ferry-house at 23d street, North river, city of New York, to the destination of the passenger in the city of New York, or from a point in the city of New York to its ferry-house at West 23d street, N. R.; and that no part of the receipts from its cab service is received as compensation for any service outside of the State of New York, it being the intention of the company to apply to the comptroller for the readjustment in this case solely upon the ground that the Pennsylvania Railroad Company's cab service in New York is part of and incidental to its interstate commerce, and therefore is not taxable at all."

Subsequently upon the 8th day of May, 1901, the comptroller refused to make any revision or restatement of the said taxes, and advised your petitioner of his said determination by letter, which was duly received on the 9th day of May, 1901, a copy of which is hereunto annexed, marked Exhibit G.

Thereupon your petitioner, upon the 22d day of May, 1901, remitted, under protest to the comptroller, the full amount of the taxes as assessed by him, with interest.

1. Your petitioner is advised and believes that it is not justly liable for the payment of the aforesaid tax, nor for the payment of any tax under and by virtue of the provisions of the tax law, chapter 908, Laws of 1896, and the acts amendatory thereof, upon its said cab service in the city of New York, and that there were no facts or evidence before the comptroller to establish or justify the assessment of said tax, and that your petitioner is entitled to a review and reversal of the decision of said comptroller and the restitution of the moneys so as aforesaid paid by it under protest.

Wherefore your petitioner prays that a writ of certiorari may issue directed to the said comptroller and commanding him to certify and return to this court all his proceedings, and the evidence, and all and singular the documents, reports, records and papers in his custody or under his control, or which were submitted to him or considered by him concerning the matter sought to be inquired of, to the end that the same may be examined, reviewed and set aside.

And your petitioner will ever pray, &c.

Dated New York, May 28th, 1901.

PENNSYLVANIA RAILROAD COMPANY,
By O. J. GEER, *Petitioner.*

ROBINSON, BIDDLE & WARD,
Attorneys for Petitioner.

Office — post-office address 160 Broadway, borough of Manhattan, city of New York.

13 CITY AND COUNTY OF NEW YORK, *ss.:*

O. J. Geer, being duly sworn, says: That he is the general agent of The Pennsylvania Railroad Company, the petitioner herein, in New York city; that he has read the foregoing petition and that the same is true of his knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

That the reason this verification is not made by the petitioner is that it is a foreign corporation, none of whose officers is a resident of or within the city and county or State of New York, which is the State of deponent's residence.

That the grounds of deponent's knowledge and the sources of his information are the reports made to him and the information acquired by him from the officers of the petitioner in the course of the investigation and examination set forth in the foregoing petition.

O. J. GEER.

Sworn to before me this 28th day of May, 1901.

C. C. HELM,
Notary Public, N. Y. Co.

14 EXHIBIT A.

In the Matter of the Cab Service of THE PENNSYLVANIA RAILROAD COMPANY.

To the comptroller of the State of New York:

STATE OF PENNSYLVANIA,
County of Philadelphia, } *ss.:*

I, John P. Green, being duly sworn according to law, deposes and says:

I am first vice-president of the Pennsylvania Railroad Company, a corporation duly created and existing under the laws of the State of Pennsylvania.

The company is engaged in the business of interstate commerce, carrying mails, freight and passengers to and from, among other places, the city of New York through the States of New Jersey, Pennsylvania, Delaware and Maryland.

The company's terminus in New Jersey is at Jersey City, and it carries its passengers and their baggage between that point and New York city by means of its ferry-boats running regularly to Cortlandt street, Desbrosses street and Twenty-third street, New York city.

As a means of increasing this business it maintains a service of fifty-five cabs and four coaches, which stand on its own premises at the Twenty-third Street ferry, and for which it has special licenses from the city of New York, under which they can only stand on those premises.

The sole business done by this service is to convey passengers crossing on the Twenty-third Street ferry from Jersey City to their destinations in the city of New York, and passengers intending to

cross over that ferry from their residences in the city of New
15 York to the ferry. The service is used exclusively by such passengers and cannot be availed of by any one else.

The company is advised that the tax law of the State of New York is not a tax upon property, but is a tax, in case of domestic corporations, upon their franchises, and in case of foreign corporations, upon their right to carry on business in the State of New York, and as such is not applicable to this company, its business in the State of New York being solely that of interstate commerce.

The material facts concerning the cab service are as follows:

It was established May 16th, 1897, and its gross receipts and expenses from that time down to June 30, inclusive, 1900, are stated in the following table:

	Gross receipts.	Gross expenses.
May 16, 1897, to June 30, inc., 1897	$4,046 02	$8,323 28
July 1, 1897, to June 30, inc., 1898	49,816 00	66,854 57
July 1, 1898, to June 30, inc., 1899	61,929 83	69,717 99
July 1, 1899, to June 30, inc., 1900	71,022 15	80,753 50
	$186,814 00	$225,649 34

The value of the horses and vehicles employed during that time is stated in the following table:

Items.	June 30th, 1897.	June 30th, 1898.	June 30th, 1899.	June 30th, 1900.
Horses.....	$14,383 00	$9,687 92	$8,693 05	$8,318 56
Vehicles ...	28,713 52	28,579 34	26,321 35	23,665 42

The real estate used by it in the city of New York is on Eleventh avenue, between Twenty-seventh and Twenty-eighth streets, and its assessed value is one hundred and thirty thousand dollars.

JNO. P. GREEN.

Sworn and subscribed to before me, a notary public of the State of Pennsylvania, for the county of Philadelphia, on this twenty-ninth day of September, 1900.

Witness my hand and notarial seal,

J. C. SIMS, [L. S.]
Notary Public.

(Prothonotary's certificate.)

16

(EXHIBIT B.)

Vol. 22, page 413.

Comptroller's office, Albany, N. Y.

The Pennsylvania R. R. Co. (cab service)—J. P. Green, V. P., 262 11th Ave., N. Y. C.—in account with the State of New York, Dr.

For tax on franchise or business, based on gross earnings, per section 186, chapter 908, Laws of 1896, for 4 years ending October 31, 1900, as per report filed .....
Gross earnings, $—, as per statement .....
Tax at the rate of five-tenths of one per cent $934.07
Tax on excess dividend .....

(EXHIBIT C.)

Statement, Vol. 22, *Page* 413.

Comptroller's office, Albany, N. Y.

The Pennsylvania R. R. Co. (cab service)—Jno. P. Green, V. P., 262 11th Ave., N. Y. C.—in account with the State of New York, Dr.

To what date.	Nature of report.	Amount taxed.	Rate %, div. mills.	Amount of tax.
1897, Oct. 31.....	Earnings.	$4,046 02	.....	$20 23
1898, Oct. 31.....	"	49,816 00	.....	249 08
1899, Oct. 31.....	"	61,929 83	.....	309 65
1900, Oct. 31.....	"	71,022 15	.....	355 11
				$934 07

17

EXHIBIT D.

Vol. 22, page 413.

Comptroller's office, Albany, N. Y.

The Pennsylvania R. R. Co. (cab service)—J. P. Green, V. P., 262 11th Ave., N. Y. C.—in account with the State of New York, Dr.

For tax on franchise or business, based on value of capital stock employed in New York State, per chapter 908, Laws of 1896 and acts amendatory thereof, for the 4 years ending October 31, 1900, as per report filed.....
Appraised value of capital stock..... $
Tax 1½ mills..... $
As per statement 1,422.54

EXHIBIT E.

Statement, Vol. 22, Page 413.

Comptroller's office, Albany, N. Y.

The Pennsylvania R. R. Co. (cab service)—J. P. Green, V. P., 262 11th Ave., N. Y. C.—in account with the State of New York, Dr.

To what date.	Nature of report.	Amount taxed.	Rate %, div mills.	Amount of tax.
1897, Oct. 31.....	Cap. stock...	$243,096 52	.....	$364 64
1898, Oct. 31.....	" ...	238,267 26	.....	357 40
1899, Oct. 31.....	" ...	235,014 40	.....	352 52
1900, Oct. 31.....	" ...	231,983 98	.....	347 98
				$1,422 54

17*a* EXHIBIT F.

S 8—3, 13, 1901.

Pennsylvania Railroad Company.

Cab Service.

Twenty-third St. Ferry station, New York.

Orders by telephone

from persons desiring cabs or omnibuses to carry them to the Twenty-third Street station will receive prompt attention.

Telephone call: "914 18th street."

An agent of the cab service will be found at the cab stand who will see that all orders for vehicles are promptly filled, and that patrons are courteously and satisfactorily served.

WM. B. BLACK,
Superintendent.

17*b* Pennsylvania Railroad Co.

Cab Service.

Twenty blocks north and south, or six blocks east and west, are equivalent to one mile.

Rates of Fare for Hansom.

From the station.

By the trip.

1½ miles or less, direct to 1 address, 1 or 2 persons ..... 25 cts.
Each additional mile or fraction thereof..... 15 cts.

On call, to go to station.

To call at any address within 1½ miles from Twenty-third Street station, 1 or 2 passengers .... 25 cts.
To call at any address exceeding 1½ miles from Twenty-third street station, for each additional mile or fraction thereof... 15 cts.
First stop, not over 15 minutes..... 25 cts.
Each additional stop, not over 15 minutes ..... 15 cts.

Rates of Fare for 4-wheeler.

From the station.

By the trip.

1½ miles or less, direct to 1 address, 1 or 2 persons ..... 40 cts.
For additional 1 or 2 passengers..... ..... 10 cts.
Each additional mile or fraction thereof, 1 or 4 persons ..... 20 cts.

On call, to go to station.

To call at any address within 1½ miles from station, and go direct to Twenty-third Street station, 1 or 2 passengers..... 40 cts.
To call at any address exceeding 1½ miles from Twenty-third Street station, for each additional mile or fraction thereof.. 20 cts.
First stop, not over 15 minutes ..... 30 cts.
Each additional stop, not over 15 minutes..... 15 cts.

17c

Rates of Fare for Omnibus.

From the station.

Minimum charge for four persons or less, 1½-mile limit..... $1.00
Each additional person..... 10 cts.
Each additional stop not over 10 minutes ..... 50 cts.
Each additional mile per omnibus..... 25 cts.

On call, to go to station.

Minimum charge for four persons or less, 1½-mile limit..... $1.00
Each additional person..... 10 cts.
Each additional stop not over 10 minutes... ..... 50 cts.
Each additional mile per omnibus..... 25 cts.

Valises, each 5 cents, only chargeable for when carried on top by driver. Trunks, each, 10 cents. No trunks carried on hansoms.

Drivers cannot leave their vehicles to carry baggage to or from rooms in hotels or residences.

When detained at any address or stop 15 minutes or a fraction thereof, 15 cents will be charged, and the same for each additional quarter hour or fraction thereof.

17d

Regulations.

These vehicles are intended for the use of persons going from or to the Twenty-third Street station of the Pennsylvania railroad.

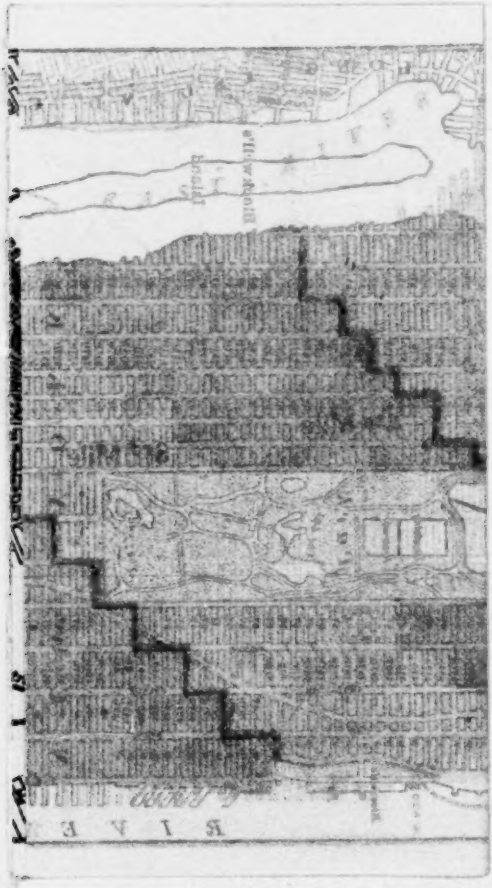
Drivers must be polite, courteous, and prompt in their service to passengers.

Drivers must not smoke while on duty.

To avoid disputes with the drivers, passengers should compute the whole distance traveled in blocks—allowing twenty (20) blocks north or south, and six (6) blocks east or west to the mile—and multiply by the rate per mile for the services rendered; being careful to consider the number of addresses served.

In case of controversy between patron and driver, and to save time and trouble, it is suggested that the passenger take the number of the vehicle and hour of the day; also pay the charges as computed by the driver, and forward statement of the facts to superintendent of cab service, who will give the complaint proper attention.

(Here follows map marked 17*e*.)



18 EXHIBIT G.

STATE OF NEW YORK:

Comptroller's office.

ALBANY, *May 8th*, 1901.

In the Matter of the Application of PENNSYLVANIA RAILROAD COMPANY for a Revision and Resettlement of Taxes Assessed against it under the Provisions of Chap. 908, Laws of N. Y., 1896, and the Several Acts Amendatory Thereof.

An application having been made by the above-named Pennsylvania Railroad Company, for a revision and resettlement of the taxes assessed and determined against it by the comptroller of the State of New York, for the four years ending June 30th, 1900, and October 31st, 1900, respectively, and the said comptroller having heard proofs offered on behalf of the said Pennsylvania Railroad Company, in support of said application, and after due consideration thereof, the comptroller does determine that the assessment heretofore made against the said Pennsylvania Railroad Company, does not include taxes which could not have been lawfully demanded, and therefore declines to make any revision or readjustment of the same.

THEO. P. GILMAN,
Deputy Comptroller.

19 *Order Directing Writ to Issue.*

At a special term of the supreme court of the State of New York, held in and for the county of Albany, at the city hall in the city of Albany on the 8th day of June, 1901.

Present: Honorable Alden Chester, justice.

In the Matter of the Petition of THE PENNSYLVANIA RAILROAD COMPANY for a Writ of Certiorari, and to be Directed to Erastus C. Knight, as Comptroller of the State of New York.

Upon reading and filing the petition of The Pennsylvania Railroad Company, verified the 28th day of May, 1901, and the notice of motion for a writ of certiorari herein on behalf of the said petitioner, dated May 29th, and said petitioner having duly filed with the comptroller of the State of New York an undertaking in the sum of $500, as required by law, approved by Hon. James A. O'Gorman, a justice of this court,

20 Now, on motion of Robinson, Biddle & Ward, attorneys for said petitioner, Hon. John C. Davies, attorney general, appearing by Robert E. Steele, Esq., deputy, on behalf of the comptroller,

Ordered, that a writ of certiorari be issued as prayed for in said petition directed to the above-named Erastus C. Knight, as comp-

troller of the State of New York, returnable within thirty days after service thereof to the office of the clerk of the county of Albany in the State of New York.

P. E. McCABE, *Clerk.*

21 *Writ of Certiorari.*

The People of the State of New York on the relation of the Pennsylvania Railroad Company to Erastus C. Knight, comptroller of the State of New York:

Whereas we have been informed by the petition of the Pennsylvania Railroad Company, that on or about December 1st, 1900, you, as comptroller of the State of New York, assumed to settle an account against the said Pennsylvania Railroad Company for taxes alleged to be due by it to the State of New York under and by virtue of the provisions of chapter 908 of the Laws of 1896, and the laws amendatory thereof and supplementary thereto, therein and thereby determining that the said Pennsylvania Railroad Company was liable to pay to the treasury of the State of New York as and for taxes under the said laws, for the four years ending October 31st, 1900, the sum of two thousand three hundred and fifty-six and $\frac{61}{100}$ dollars, and that you did, on or about the 14th day of February, 1901, grant and hold a rehearing on that behalf, and thereafter, on or about the 8th day of May, 1901, did refuse to make any revision or readjustment of your said settlement of said taxes, and said taxes and penalties having been paid by the said Pennsylvania Railroad Company under protest, and an undertaking for costs having been filed by said company, in accordance with the statute in such case made and provided;

And we, being willing to be certified of your proceedings as comptroller in the premises which are alleged by the said petitioner to be without jurisdiction and contrary to law,

Do command, that you do certify and return to the office of
22 the clerk of the county of Albany, within thirty days after the service of this writ upon you, all and singular your proceedings and decisions in the premises, with the dates thereof, and all and singular the evidence, documents, reports, records or papers relating thereto in your possession or under your control or submitted to you, or considered by you concerning the said matters, and all proceedings thereon and thereafter, to the end that your said settlement and decision may be reviewed and corrected by this court according to law.

Witness the Honorable Alden Chester, one of the justices of our supreme court at the city hall, Albany, on the 8th day of June, 1901.

[SEAL.] P. E. McCABE, *Clerk.*

ROBINSON, BIDDLE & WARD,
Attorneys for Relator.

The above writ approved and allowed this 8th day of June, 1901.

ALDEN CHESTER, *J. S. C.*

23 *Return to Writ.*

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* THE PENNsylvania Railroad Company, Relator,
vs.
ERASTUS C. KNIGHT, as Comptroller of the State of New York, Defendant.

To the supreme court:

The defendant above named hereby makes return to the writ of certiorari herein as follows:

I. He admits the allegations of fact in the petition herein alleged, except as hereinafter denied.

II. He denies that the relator's cab service is incidental to and a part of the relator's business of interstate commerce, and is of no value whatever except as a part thereof.

III. He does not admit the conclusions, reasons and arguments contained in the petition herein.

IV. He further returns that said tax was regularly and legally imposed upon the relator, such tax being upon its capital employed within the State of New York, according to the provisions of section 182 of the tax law, and also a further tax being equal to five-tenths of one per centum upon the relator's gross earnings within
24 the State, which included its gross earnings from its transportation or transmission business originating and terminating within this State, but not including earnings derived from business of an interstate character.

In witness whereof the comptroller has hereunto set his
[L. S.] hand and official seal this 17th day of June, 1901.

ERASTUS C. KNIGHT,
Comptroller.

(Endorsed:) Supreme court, Albany county.—People of the State of New York *ex rel.* the Pennsylvania Railroad Company, relator, *vs.* Erastus C. Knight as comptroller of the State of New York, defendant.—Copy. Return to writ. John C. Davies, attorney general, capitol, Albany, N. Y. Filed June 18th, 1901.

25 *Order of the Appellate Division Affirming Determination of Comptroller.*

At a term of the appellate division of the supreme court, in and for the third judicial district, held at the city of Albany, commencing on the 12th day of November, 1901.

Present: Hon. Charles E. Parker, presiding justice; Hon. Walter Lloyd Smith, associate justice; Hon. Samuel Edwards, associate justice; Hon. Emory A. Chase, associate justice; Hon. James W. Houghton, associate justice.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* PENNSYLVANIA Railroad Company, Relator,
against
ERASTUS C. KNIGHT, as Comptroller of the State of New York, Defendant.

A writ of certiorari in the above-entitled proceeding issued out of the supreme court, having been duly served on Erastus C. Knight, comptroller of the State of New York, and the comptroller having made due return thereto, and this proceeding upon
26 the law and the facts having been argued by Mr. A. Leo Everett, of counsel for the relator, and Mr. Henry B. Coman, of counsel for defendant, and due deliberation having been had thereon; it appearing to this court that the comptroller of the State of New York has audited and stated the account of the relator for the State franchise tax upon the capital and earnings of the relator within the State during the four years ending *November* 31st, 1900, at the sum of $2,356.61.

It is hereby ordered and adjudged, that the determination of the comptroller be, and the same hereby is, unanimously affirmed.

It is further ordered, that the defendant herein, the comptroller of the State of New York, recover of the said relator, The Pennsylvania Railroad Company, the sum of $50 costs of this proceeding and $48.59 disbursements, making a total of $98.59.

JOSEPH H. HOLLAND, *Clerk.*

27 *Judgment or Order Entered on Order of Appellate Division.*

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* PENNSYLVANIA Railroad Company, Relator,
vs.
ERASTUS C. KNIGHT, as Comptroller of the State of New York, Defendant.

A writ of certiorari having issued out of the supreme court in the above-entitled proceeding, to review the determination of the comptroller of the State of New York, in auditing and stating the account of the relator for the State franchise tax upon the capital and earnings of the relator within the State during the four years ending *November* 31st, 1900, at the sum of $2,356.61, and the matter having been argued before the appellate division of the supreme court, held in and for the third judicial department, at the November, 1901, term, by A. Leo Everett, Esq., of counsel for the relator, and Henry B. Coman, Esq., deputy attorney general, of counsel for the defendant, and the said court, after due deliberation, having made its order affirming the determination of the comptroller, with $50 costs, and disbursements to be taxed,

28 Now, therefore, it is hereby ordered that the said determination of the comptroller be and the same is hereby affirmed,

and it is hereby adjudged, that the defendant, Erastus C. Knight, as comptroller of the State of New York, recover of the relator, The Pennsylvania Railroad Company, the sum of fifty dollars costs, and forty-eight dollars and fifty-nine cents disbursements, amounting in the aggregate to ninety-eight dollars and fifty-nine cents, and that the defendant have execution against the said The Pennsylvania Railroad Company therefor.

JOHN FRANEY, *Clerk.*

29 *Notice of Appeal.*

New York Supreme Court.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* PENNSYLVANIA RAILROAD COMPANY, Relator, Appellant,
vs.
ERASTUS C. KNIGHT, as Comptroller of the State of New York, Defendant, Respondent.

Please take notice, that The Pennsylvania Railroad Company, the relator above named, hereby appeals to the court of appeals of the State of New York from the order of the appellate division of the supreme court for the third judicial department, made and entered in the above-entitled proceeding in the office of the clerk of said appellate division in the city of Albany, on or about January 13th, 1902, which said order affirms the determination of the comptroller in auditing and stating the account of the relator for the State franchise tax during the four years ending *November* 31st, 1900, at the sum of $2,356.61, and from the judgment or order entered in the office of the clerk of the county of Albany on or about January 14th, 1902, upon said order of the appellate division, affirming said determination of the comptroller and adjudging that the defendant recover against the relator the sum of ninety-eight $\frac{59}{100}$ dol-
30 lars, and from each and every part of said order of January 13th, 1902, and of said order or judgment of January 14th, 1902.

Dated New York, Feb. —, 1902.

Yours, etc.,

ROBINSON, BIDDLE & WARD,
Attorneys for Relator, Appellant, 160 *Broadway, Borough of Manhattan, City of New York.*

To John C. Davies, Esq., attorney general; clerk of the county of Albany; clerk of the appellate division for the third department.

31 *Opinion.*

Supreme Court, Appellate Division, Third Department.

Argued November term, 1901.

Decided adjourned term, December, 1901.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* Pennsylvania Railroad Company, Relator,
against
ERASTUS C. KNIGHT, as Comptroller of the State of New York, Defendant.
} Opinion.

Before Parker, P. J.; Smith, Edwards, Chase, Houghton, associate justices.

Certiorari issued out of the supreme court and attested on the 8th day of June, 1901, directed to Erastus C. Knight, as comptroller of the State of New York, commanding him to certify and return to the clerk of the county of Albany all and singular his proceedings and decisions in stating the corporation franchise tax against the Pennsylvania Railroad Company for the years ending October 31st, 1900, with the dates thereof and the evidence, documents, reports, records or papers relating thereto in his possession, or under his control, or submitted to him, or considered by him in said matter and all proceedings thereon and thereafter to the end that his settlement and decision may be reviewed by this court.

Leo Everett and Henry Galbraith Ward, for relator.

Henry B. Coman, deputy attorney general, for comptroller.

32 CHASE, *J.*:

The relator is a foreign corporation engaged in carrying freight and passengers in Pennsylvania, New Jersey and other States. It is a common carrier of passengers to and from New York city. Its terminus in New Jersey is Jersey City, from whence it conveys its New York passengers by ferry-boats operated by it to and from its station at 23d street, North river, and other points in New York. Its terminus in New York city is such ferry stations. In the year 1897, it established a cab stand on its premises at said 23d Street ferry station, and it has since continuously maintained a cab service to and from such station. It issues and distributes to the public a circular containing a list of cab charges and rules for the conduct of its drivers, and also statements as follows:

"An agent of the cab service will be found at the cab stand, who will see that all orders for vehicles are promptly filled, and that patrons are courteously and satisfactorily served.

"Orders by telephone from persons desiring cabs or omnibuses to carry them to the 23d Street station will receive prompt attention.

"These vehicles are intended for the use of persons going from or to the 23d Street station of the Pennsylvania railroad."

In 1890, no tax having theretofore been collected upon such cab service, the comptroller applied to the relator for a statement of the gross receipts and expenses of said service since it was started, and also for the value of the horses and vehicles employed and the real estate used in said service. The relator complied with said request and the comptroller on the 1st day of December, 1900, stated and fixed a tax of $934.07 to be paid by the relator upon its gross
33 earnings in said cab service during the four years ending October 31st, 1900, and $1,422.54 computed upon the basis of its capital so employed within this State for said period. The relator applied to the comptroller to revise and readjust such account, and after a hearing thereon the comptroller refused to make any revision or readjustment of said account for taxes. On the application for a revision and readjustment of said account for taxes the relator conceded that no part of the receipts from its cab service is received as compensation for any service outside of the State of New York, and stated that it based its right to exemption solely upon the ground that the service is part of and incidental to its interstate commerce. In the relator's petition herein it says: "It is true that the charge for cabs is separate from the charge for the balance of the passenger's transportation, but this is necessary from the nature of things. It would be impossible for your petitioner to include in its railroad and ferry tickets the price of the cab service, first, because, as the price would vary in amount in every case according to the distance the passenger is carried, an infinity of tickets would have to be provided; and, second, because passengers buying railroad tickets to New York do not know whether they will employ a cab or not."

The tax is not on the property of the relator, but upon its privilege of exercising its corporate franchises or carrying on its business in its corporate or organized capacity in this State. Tax Law, sections 182–184; People *ex rel.* Pennsylvania Railroad Co. *vs.* Wemple, 138 N. Y., 1. Such tax cannot be imposed upon a business consisting wholly of interstate commerce. People *ex rel.* Pennsylvania Railroad Company *vs.* Wemple, *ib.*

All contracts for cab service with the relator are made and the journey, so far as such contracts are concerned, is commenced
34 and ended in this State. The *situs* of the property used in such service is in this State. A person making an interstate journey to New York by contract with the relator buys a ticket to New York only, and the relator's contract is fulfilled when the passenger is safely carried to one of the relator's ferry stations in New York. If it happens that the passenger is carried to New York on a Twenty-third Street ferry he may, if he chooses, after his arrival employ a cab of the relator to take him to any part of the city where fancy or business may call him. He cannot, if he would, contract for such cab service before he arrives in this State. In the language of the relator's petition we say that the relator could not make the cab service a part of the original contract, "because passengers buying tickets to New York do not know whether they will employ a cab or not."

If a person at some point within the city of New York calls one of the relator's cabs to carry him to the Twenty-third Street station, he may do so for the purpose of meeting a friend on his arrival in New York or he may do so in contemplation of an interstate journey and then before taking the ferry change his mind and return to the starting point by cab or otherwise.

The cab service would seem to be wholly independent of, and disconnected with the interstate journey as much as are the street and elevated roads upon which many of the relator's passengers doubtless immediately go from the ferry station to some interior point in the city.

The relator's serious difficulty in making the interstate journey continue to some interior point in the city, is not so much one relating to the tickets as it is that the passengers want the interstate journey to end at the ferry station and then leave their further
35 movements to depend upon a decision to be formed after their arrival in the city.

The power of taxation by the State is essential to its existence. It is abridged by the Federal Constitution only as it effects commerce among the several States. There is nothing in the relator's cab service affecting more than one State or in which the people of other States are interested. The cab contract is not in itself interstate. It is in no sense like the carrying of freight destined for an interior point and consummated in part by a contract like the one considered in the case of The Daniel Ball, 10 Wall., 557.

The relator contends that its cab service is, at least, incidental to interstate commerce. Only business that is necessarily or essentially connected with interstate commerce is entitled to exemption from the tax. Business only remotely incidental to interstate commerce, like that of conducting a hotel or warehouse or the cab service now under consideration, is not necessarily or essentially connected with interstate commerce. Such business is clearly distinguishable from the maintenance of offices and employment of agents in soliciting interstate freight as in the case of Norfolk and Western Railroad Co. *vs.* Commonwealth of Pennsylvania, 136 U. S., 114.

In Munn *vs.* People of Illinois, 94 U. S., 113, in discussing an act fixing a maximum charge for the storage of grain in warehouses at Chicago and other places, the court say:

"The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the
36 cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so."

In Coe *vs.* Erroll, 116 U. S., 517, the court in considering a question as to local taxation of the products of a State intended for exportation to another State, uses language somewhat applicable to this case. The court in that case say: "Do the owner's state of mind in relation to the goods, that is, his intent to export them, and

his partial preparation to do so, exempt them from taxation? This is the precise question for solution. * * * There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. * * * Although intended for exportation they may never be exported; the owner has a perfect right to change his mind, and until actually put in motion, for some place out of the State or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State? * * * It
37 is true it was said in the case of The Daniel Ball, 10 Wall., 565, "Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced." But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other. The carrying of them in carts or other vehicles, or even floating them to the depot where the journey is to commence, is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm or the forest to the depot is only an interior movement of the property entirely within the State for the purpose, it is true, but only for the purpose of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State, its exportation is a matter altogether *in fieri* and not at all a fixed and certain thing."

In the case of The United States *vs.* Boyer 85 Fed. Rep. 425 the court say: "When interstate commerce begins, is determined not by the character of the commodity nor by the intention of the owner who transferred it to another State for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation or the actual commencement of its transfer to another State."

The determination of the comptroller is confirmed with $50 costs, and disbursements.

38 *Stipulation.*

New York Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* PENNSYLVANIA Railroad Company, Relator, Appellant,
against
ERASTUS C. KNIGHT, as Comptroller of the State of New York, Defendant, Respondent.

It is hereby stipulated that the foregoing are true copies of the notice of motion, petition, undertaking, order for writ of certiorari, writ of certiorari, and the return of the defendant thereto in this proceeding on file in the office of the clerk of Albany county, order of affirmance and order or judgment entered thereon, and opinion of appellate division.

Dated February 26th, 1902.

ROBINSON, BIDDLE & WARD,
Attorneys for Relator, Appellant.
JOHN C. DAVIES, *Attorney General,*
Attorney for Defendant, Respondent.

STATE OF NEW YORK,
County of Albany, Clerk's Office, } *ss:*

I, John Franey, clerk of the said county, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the annexed copy remittitur & papers on appeal with the original thereof, filed in this office on the 21 day of June, 1902, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 14 day of July, 1902.

[Seal Albany County, July, 1847.]

JOHN FRANEY, *Clerk.*

39 THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* PENNSYLVANIA Railroad Company, Appellant,
v.
ERASTUS C. KNIGHT, as Comptroller of the State of New York, Respondent.

(Decided June 10, 1902.)

Henry Galbraith Ward for appellant.
Henry B. Coman for respondent.

CULLEN, *J.:*

I agree with Judge Bartlett that the only question presented on this appeal is whether the business carried on by the relator, and for which a franchise tax has been imposed, is interstate commerce

or not. For, though it may be that the State of New York could leavy a franchise tax on the gross earnings of a foreign corporation for the privilege given it of running a cab line within this State, even for the purposes of interstate commerce (see *Maine v. Grand Trunk R'y Co.*, 142 U. S. 217; cited with approval, *American Refrigerator Co. v. Hall*, 174 U. S. 70), section 184 of our tax law excludes earnings derived from business of an interstate character from liability to the tax. I insist, however, that the transportation for which the relator has been taxed is not interstate commerce. It is not rendered under any contract for transportation from a point within the State to a point without the State, or *vice versa*, but is solely a carriage between two points within the State under a separate contract. As pointed out by the appellate division, the use of the relator's cabs is not restricted to those who have previously secured transportation to or from some point on its railroad, nor is such use confined to travellers upon the railroad. Such a traveller may be accompanied by a friend, to or from the ferry only, and one intending to travel upon the railroad may change his intention when he reaches the ferry. It is first to be observed that the fact that the relator is a foreign corporation has no effect on the question whether its cab service is interstate commerce or not. A domestic corporation or an individual citizen of this State may engage in interstate commerce as well as any foreign corporation. Transportation from the city of New York to the town of Port Chester is domestic or intrastate commerce, because both places are in this State, although the transportation is performed by a foreign corporation, the New York and New Haven Railroad Company. Transportation from the city of New York to Paterson, New Jersey, is interstate commerce, although it is over the road of a New York corporation, the Erie Railway Company. Therefore, it is the character of the service, not the character of the carrier, that determines whether the transportation is interstate commerce or not. If in the instance suggested by counsel, when a person intending to travel to Washington takes one of the relator's cabs to carry him from the Fifth Avenue hotel to the relator's ferry station that transportation is interstate commerce it is necessarily equally so when he is carried by a cab called from the hack stand in Madison square opposite. A carrier may engage in both interstate commerce and in domestic commerce, but that fact does not determine the character of the carrier's whole business or change what would otherwise be domestic commerce into interstate commerce, or *vice versa*. The fact, therefore, that cabs from the ordinary stands take passengers to any part of the city, does not affect the character of their service when they carry passengers to railway or ferry stations within the State on journeys to points without the State. Nothing is better settled by the decisions of the Supreme Court of the United States than that in the case of interstate transportation the legislature cannot prescribe the charge to be made for even that part of the transportation which is to be performed within the State. (*Wabash, etc., R'y Co. v. Illinois*, 118 U. S. 557.) Hence, if the doctrine contended for by the relator is correct, the city of New York has no right to pre-

scribe the fares to be charged by public hacks or cabs for transporting travelers to the ferries on the North river except when the traveler intends to take passage to some point in the State of New York, nor for taking travelers to the Grand Central station, when such travelers are journeying to Boston or to the West.

If this cab service can in any way become part of interstate commerce (of which there may be some doubt as I shall show by the authorities), I insist it can only be such when the service is rendered under an entire contract for continuous carriage to or from some point without the State. It may be that there is no case in the Supreme Court of the United States which directly decides this proposition. But there is no authority to the contrary and there are a number of cases in that court which seem to recognize this as the true test of what transportation constitutes interstate commerce. The question has been presented in litigations arising under the interstate-commerce act with reference to railroad companies whose roads lay entirely within a single State. Of such a case the Supreme Court said in *Cincinnati, New Orleans, etc., R'y Co. v. Interstate Commerce Commission* (162 U. S. 184): "It may be true that the 'Georgia Railroad Company,' as a corporation of the State of Georgia, and whose entire road is within that State, may not be legally compelled to submit itself to the provisions of the act of Congress, even when carrying, between points in Georgia, freight that has been brought from another State. It may be that if, in the present case, the goods of the James and Mayer Buggy Company had reached Atlanta, and there and then, for the first time, and independently of any existing arrangement with the railroad companies that had transported them thither, the Georgia Railroad Company was asked to transport them, whether to Augusta or to Social Circle, that company could undertake such transportation free from the control or any supervision except that of the State of Georgia. But when the Georgia Railroad Company enters into the carriage of foreign freight, by agreeing *to receive the goods by virtue of foreign through bills of lading and to participate in through rates and*
41 *charges*, it thereby becomes part of a continous line, not made by a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one State to another, and thus becomes amenable to the Federal act, in respect to such interstate commerce." So in *Louisville & Nashville Railroad Company v. Behlmer* (175 U. S. 648) it was held that the fact that "the several carriers transported hay from Memphis under through bills of lading, by continuous carriage, to Summerville and Charleston" rendered the traffic interstate commerce even as to that part of it formed by a carrier furnishing transportation wholly within a single State. If this be the true doctrine as to the transportation of property, I do not see why it is not equally the true doctrine as to the transportation of persons.

I have suggested that there was some doubt whether under the authorities the relator's cab service could become a part of interstate commerce. In *Munn v. Illinois* (94 U. S. 113, Chicago elevator cases), in answer to the claim that the warehouses and elevators were in-

strumentalities of interstate commerce, it was said by the court: "The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. *They are used as instruments by those engaged in State as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another.* Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction." In *Coe v. Errol* (116 U. S. 517) it was said: "'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. (*The Daniel Ball*, 10 Wall. 565.)' But this movement does not begin until the articles have been shipped or started for transportation from one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation." In the recent case of *Detroit, etc., R'y Co. v. Interstate Commerce Commission* (43 U. S. App. 308) it was held that the cartage of goods by the railroad company to and from the station for shippers and consignees was not within the interstate-commerce act. It is there said: "We cannot think that, under the circumstances, it was the intention of Congress to confuse in our legislation the carting to and from the stations with the transportation on the rails, and if the act can be interpreted to avoid that confusion, it should be done. We may suppose,
42 since with us it is a business done almost exclusively by outsiders and rarely by the railroad companies, *and being usually done wholly within the territorial limits of a State is not within the jurisdiction of Congress*, that it was not intended to interfere with it except so far as it might affect directly the transportation of goods between the States, by being used as a device to evade the jurisdiction over that subject." This case was affirmed by the Supreme Court in 167 U. S. (p. 633) which expressed its approval of the view of the court below "that the railway transportation ends when the goods reach the terminus or station and are there unshipped, and that anything the company does afterwards, in the way of land transportation, is a new and distinct service, not embraced in the contract for railway carriage."

There remains to be considered two cases on which the relator largely relies as authorities for its contention. The first is a case of this relator in this court reported in 138 N. Y. (p. 1). There it was held that a franchise tax could not be imposed on the relator for capital invested in its ferry station and terminal grounds in the city of New York, although the property itself was subject to taxation. At that time the business of the relator, so far as it was prosecuted

within this State, was confined to the operation of a ferry from Jersey City to New York and to the maintenance at the latter place of its wharves, ferry-house and terminal facilities. The case was unquestionably properly decided under the doctrine declared in *Gloucester Ferry Co. v. Pennsylvania* (114 U. S. 196). There the plaintiff, a New Jersey corporation, ran a ferry from Gloucester in that State to Philadelphia. It had no property in the latter city other than a wharf which it leased. Its steamboats were registered in New Jersey. A tax imposed by the State of Pennsylvania upon the dividends of all corporations doing business within the State was held illegal as against that company. Judge Field said: "As to the second reason given for the decision below, that the company could not lease its wharf in Philadelphia except by the implied consent of the legislature of the Commonwealth, and thus is dependent upon the Commonwealth to do its business, and, therefore, can be taxed there, it may be answered that no foreign or interstate commerce can be carried on with the citizens of a State without the use of a wharf, or other place within its limits on which passengers and freight can be landed and received, and the existence of power in a State to impose a tax upon the capital of all corporations engaged in foreign or interstate commerce for the use of such places would be inconsistent with and entirely subversive of the power vested in Congress over such commerce." It is contended that no distinction can be drawn between the right of the relator to transport its passengers by ferry to the city of New York across the waters of the Hudson, which are within the limits of this State, and its right to transport passengers by cabs to and from points in the city of New York. I insist that there is a marked distinction between the two rights, and that the
43 distinction is recognized in all the cases in the Supreme Court of the United States which deal with the subject. In *Railroad Company v. Maryland* (21 Wall. 456) it was urged that transportation on land was governed by the same principle as transportation by water and exempt to the same extent from State control. The court decided against this contention, and it was held: "Commerce on land between the different States is so strikingly dissimilar in many respects from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land." The foregoing extract from the case cited was quoted with approval

in *Pullman's Car Co. v. Pennsylvania* (141 U. S. 18). The navigable waters of the United States, even when they lie exclusively within the limits of a State, are open to all the world, except so far as Congress may prescribe to the contrary, and it requires no leave or license from a State (except compliance with its police regulations and possibly payment of tolls imposed to defray the cost of improvements in navigation) for a vessel to journey on those waters. Not so with the land. No one can construct and operate a turnpike or railroad within a State unless by grant from the State or by the authority of Congress under its constitutional power to establish post-roads.

The second case relied on by the appellant is *The Daniel Ball* (10 Wall. 557). In that case the question was whether a steamboat engaged in navigating Grand river, Michigan, wholly within that State, was required to take out a license in compliance with the provisions of the United States statute. Some articles of freight carried by the vessel were marked for points without the State, though it did not appear that they were being transported under any agreement for continuous transportation to such points. It was held that the steamer was engaged in interstate commerce and subject to the regulations of Congress. Doubtless this case would be an authority for the position of the relator had not the court been careful to say: "The present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over
44 interstate commerce when carried on by land transportation."

In *Lord v. Steamship Company* (102 U. S. 541) the question was as to the application of an act of Congress limiting the liability of ship-owners to the case of a vessel navigating the high seas between ports of the same State. It was held that the transportation was subject to congressional regulation. In that case there appears to have been found no freight destined to points without the State. So it was necessary to place the decision on a different ground from that on which the decision in *The Daniel Ball* rested. It was held that while Congress had no control over the internal commerce of the State, still that the vessel when navigating the Pacific ocean, though between two ports of the same State, was engaged in commerce with foreign nations and was subject to the regulating power of Congress. *Matter of Garnett* (141 U. S. 1) presented the question again. There a steamer was engaged in the carrying trade between Augusta and Savannah, both on the same river in the State of Georgia. The petitioner, a shipper of goods between these two points, alleged that the ship-owner's liability was not subject to limitation by the act of Congress. The case did not fall within the principle of the decision in *The Daniel Ball* or of that in *Lord v. Steamship Company*. It was held that the shipment was subject to the act of Congress, not because it was any part of interstate or foreign commerce, but by virtue of "the admiralty and maritime jurisdiction granted to the Federal Government by the Constitution of the United States," which extends to all public navigable waters. In *Lehigh Valley Railroad Company v. Pennsylvania* (145 U. S. 192) it was contended that the State of Pennsylvania had no power to tax

the plaintiff on transportation over its railroad from one point in the State to another where, for a part of the distance, a passenger was carried through another State. Reliance was placed by the plaintiff in error on the decision of the court in *Lord v. Steamship Company* (*supra*). It is difficult to see why if the fact that transportation from one point in a State to another was foreign commerce, because the vessel furnishing the transportation navigated the high seas in its voyage between those places, the same principle would not render transportation by railroad from one point to another in the same State, where the line of the railroad for a part of the distance lay in another State, interstate commerce. The court, however, held that it was not interstate commerce, and while upholding the decision in the *Lord* case practically repudiated the ground on which the decision had been placed. Of the *Lord* case the court said: "But it was unnecessary to invoke the power to regulate commerce in order to find authority for the law in question. As stated by Mr. Justice Bradley *In re Garnett* (141 U. S. 1, 12): 'The act of Congress which limits the liability of ship-owners was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends.'" It will thus be seen that the control of Congress over ships, vessels and the navigation of public waters has finally been placed by the Supreme Court of the United States on the solid foundation of the maritime and admiralty jurisdiction of the Federal Government, and that while the decisions actually made in *The Daniel Ball* and *Lord* cases remain the law, the grounds on which they proceeded are no longer deemed tenable and the opinions rendered in those cases, no longer authorities.

In closing, reference should be made to the recent decision of this court in *People ex rel. N. Y. C. & H. R. R. Co. v. Morgan, Comptroller* (168 N. Y. 1). That case, so far from being in conflict with the views I have expressed, is a direct authority for the proposition that the liability of a carrier corporation to a franchise tax on its transportation depends not on the question whether the carrier is a domestic or foreign corporation, but on the character of the transportation itself.

The order appealed from should be affirmed, with costs.

BARTLETT, *J.* (dissenting):

The relator is a foreign corporation, chartered by the State of Pennsylvania, and engaged in the transportation of freight, mails and passengers in the States of New York, New Jersey, Pennsylvania, Delaware and Maryland. Its rail terminus is in the State of New Jersey, at Jersey City, from which point it conveys passengers and their baggage by ferry-boats operated by it to various points in the city of New York, including Twenty-third street and North river.

The sole business of the relator in the city of New York, with reference to passengers and their baggage, was taking them from and

landing them on the New York shore of the North river, until the month of May, 1897, when it established a cab stand at the Twenty-third Street ferry, which it has since maintained, its sole object being to carry passengers and their baggage, arriving at and departing from the city of New York at this point, to and from their residences or hotels.

The facts are undisputed, and the statements contained in the petition for the writ of certiorari, and the affidavit of the officer of the relator subsequently submitted, are the foundation upon which the assessments involved herein rest.

The relator alleges that the cab service is incidental to and part of its business of interstate commerce, and it is of no value whatever except as a part thereof, because it is, and always has been, separately considered, carried on at a loss.

It is further alleged that the charge for cabs is separate from the charge for the balance of the passenger's transportation, and
46 that it is necessarily so from the nature of things, it being impossible to include in the railroad and ferry tickets the price of the cab service, as it varies in amount in every case, according to the distance the passenger is to be carried; and, also, for the reason that passengers buying railroad tickets to New York do not know whether they will employ a cab or not; and in respect to passengers starting from New York it would be impossible to supply the drivers of the cabs with tickets to distant destinations in other States.

The record discloses that the State comptroller did not assess a tax on this cab service until the autumn of the year 1900, when he applied to the relator for a statement of the gross receipts and gross expenses of the cab service to June 30th, 1900, and also for the value of personal property employed during that time, and the value of any real estate used by the relator in the city of New York in connection with such cab service.

The comptroller seeks to assess the relator under two distinct sections of the tax laws (Laws of 1896, chap. 908) upon the business of the cab service thus conducted in connection with its interstate railway service.

Section 182 of the tax law imposes a franchise tax on domestic corporations. At the close of this section it is provided as follows: "Every corporation, joint stock company or association organized, incorporated or formed under the laws of any other State or country, shall pay a like tax for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity in this State, to be computed upon the basis of the capital employed by it within this State."

Section 184 of the tax law provides for an additional franchise tax on transportation and transmission corporations and associations, which reads as follows: "Every corporation and joint stock association formed for steam surface railroad, canal, steamboat, ferry, express, navigation, pipe line, transfer, baggage express, telegraph, telephone, palace-car or sleeping-car purposes, and all other transportation corporations not liable to taxes under sections one hun-

dred and eighty-five or one hundred and eighty-six of this chapter, shall pay for the privilege of exercising its corporate franchises of carrying on its business in such corporate or organized capacity in this State, an annual excise tax or license fee which shall be equal to five-tenths of one percentum upon its gross earnings within the State, which shall include its gross earnings from its transportation or transmission business originating and terminating within this State, but shall not include earnings derived from business of an interstate character."

The return called for was duly made to the comptroller, who assessed a tax under section 182 of $934.07, based on the gross earnings of the cab service for the four years ending October 31st, 1900; also, a tax was assessed under section 184 of $1,422.54, being equal to five-tenths of one percentum upon the gross earnings within this State.

It was stipulated before the comptroller, on the application to review this assessment, that it was made solely upon the
47 ground that the relator's cab service in the city of New York is a part of and incidental to its interstate-commerce business and, therefore, not taxable. The comptroller after a hearing duly had refused to make any revision or restatement of the assessment and tax.

The appellate division having affirmed the decision of the comptroller, this court is now called upon to review the order to that effect.

If the relator is legally taxable on its cab service, no question is made as to the manner in which the taxes were assessed.

The legislature has stated in express terms in section 184, in computing a tax thereunder, that earnings derived from a business of an interstate character should not be included.

It is true, as suggested by counsel, that the precise point presented by this appeal has never been considered by the court. It is, however, equally true that the controlling principles involved in this case were carefully considered by the court in *People ex rel. Pennsylvania Railroad Company v. Wemple, comptroller* (138 N. Y. 1). The opinion in the case cited was written by Chief Judge Andrews, wherein is elaborately discussed the constitutional question now presented for decision. The learned judge thus states the facts in the case before him: "The relator is a Pennsylvania corporation, operating a line of railroad for the transportation of freight and passengers, extending through the State of New Jersey into other States of the Union. No part of its road is within the State of New York. But it operates in connection with its road a ferry from the New Jersey shore across the Hudson river to the city of New York, where it has terminal facilities, consisting of wharves, piers, docks and buildings connected therewith, used in the prosecution of the business of delivering freight and passengers carried over its line to that city, and of receiving freight and passengers to be carried from the city into New Jersey and other States reached by its system of roads. The only transportation over New York territory, carried on by the relator, is over that part of the Hudson river within the territorial

boundaries of the State by means of its ferry-boats. It collects in the city of New York money due for transportation to that point and for transportation from that city and there makes contracts for transportation of freight and passengers over its lines and issues and sells passenger tickets. It employs in the city of New York a large number of agents, clerks and laborers in the prosecution of its business. It is engaged in no business in that city except such as relates to the transportation of freight and passengers over its lines."

It is claimed on behalf of the relator in the case cited that the tax imposed was upon interstate commerce in violation of the so-called "commerce clause" of the Federal Constitution. (Article 1, § 8, clause 3.)

The learned judge further stated in his opinion as follows:

48 "In determining the question now presented, two propositions must be deemed established. One is that the business in which the relator was engaged in this State was exclusively that of interstate commerce. Whatever it did here was incident to and in aid of the business of interstate transportation. Interstate transportation was not a part of its business only in this State. * * * The second point which must be deemed to be established is that the tax imposed upon corporations * * * is a tax upon the 'corporate franchise or business,' and is not a tax upon property. * * * We come, therefore, to the crucial question in the case—can the State of New York tax the relator, a foreign corporation, upon its business carried on in this State, which is exclusively the business of interstate commerce. The question stated in another form is, May a State tax a foreign corporation whose business in such State is exclusively that of interstate commerce for the privilege of transacting that business here because, as we have held, this is the essential nature of the tax under the act of 1880. (*People ex rel. S. C. O. Co. v. Wemple*, 131 N. Y. 68.) The State may subject to a property tax, in common with other property, every description of property, real and personal, having its situs there, although used or employed exclusively in the business of foreign or interstate commerce. Ships or vessels engaged in foreign or coastwise commerce may be taxed at their home port and the products of one State carried into another and there held for sale by the original purchaser, and may be taxed even before sale in the State to which they have been taken. * * * If the tax imposed upon corporations by the act of 1880, and the subsequent statutes amending the same had been a property tax instead of a tax on franchise or business, it would not, as we interpret the decisions of the United States Supreme Court, have been subject to the objection now made in behalf of the relator, nor could the relator have lawfully resisted its payment. * * * The tax against the Pennsylvania Railroad Company involved in this case, was distinctly a tax on its business, and that business in this State, as we have said, was exclusively interstate commerce. * * * * The relator is lawfully here, and being here it cannot, we think, under the authorities be lawfully subjected by the State to a tax upon its business of interstate commerce, or for the privilege of conducting its business here."

I have thus indicated the precise points upon which the decision in the case cited rests. In that case, as in this, the relator was the Pennsylvania Railroad Company. The question in that case was whether the transportation of passengers from its railway terminus in Jersey City, over certain territory of the State of New York, in ferry-boats, was a continuation of its interstate commerce. In this case the question is, that if the same relator continues the transportation of its passengers still further into the territory of the State of New York by cab, whether it is a continuation of its interstate business.

The only point raised by the relator in this appeal is based
49 *upon the proposition that* the transportation of passengers from the New York side of the ferry to and from their residences or hotels is as much a part of its interstate business as was the transportation of its passengers by ferry-boat, which was approved by this court and held to be exclusively interstate commerce.

It is uncontroverted in this record that the relator does not seek to do, and does not carry on a general cab business in the city of New York. It further appears that these cabs are solely used for the purpose of the transportation of passenges coming from or going to the line of the relator's road.

The argument on behalf of the State comptroller is that this cab service is to be regarded, necessarily, as an independent business; that it is no part of the transportation of a passenger (by way of illustration) traveling from Washington to the Fifth Avenue hotel in the city of New York.

We are unable to see any distinction between the right of the relator to transport its passengers by ferry, or by cab, to or from points in the city of New York. It can be said of the relator in this case, as it was said of it in the case cited, that "it is engaged in no business in that city except such as relates to the transportation of passengers * * * over its lines."

It is insisted on behalf of the State comptroller that the cab service is to be regarded as starting and terminating within the State of New York. Even if this were so, that fact alone does not characterize the cab service exclusively as a domestic business.

While we are to be controlled by the decisions of the Supreme Court of the United States, when applicable to a case involving a Federal question, I am of opinion that to extend the rule, as laid down in the case involving the rights of this relator and already cited, to the new facts now presented is not in conflict with any decision of that court, but, on the contrary, is in harmony with a number of well-considered authorities.

In the case of *The Daniel Ball* (10 Wall. [77 U. S.] 557) the question was whether the steamboat named, which was engaged in navigating Grand river, Michigan, wholly within the limits of that State, should be licensed under the United States statute. It appeared that some of the goods carried by it were destined to and marked for points beyond the State of Michigan. The court said (p. 565), referring to the question of interstate commerce: "She was employed as an instrument of that commerce; for, whenever a commodity has begun to move as an article of trade from one State

to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, *some acting entirely in one State* and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress."

The relator, by its cab service, simply extended its care of passengers at a loss to itself and provided an additional means of transportation which conveyed them for a reasonable compensation to their destinations in the city of New York. These passengers, when in the cabs of the relator, were in the process of transportation precisely as were the goods carried by the vessel *Daniel Ball* marked for points beyond the State of Michigan. (*Lord v. Steamboat Co.*, 102 U. S. 541; *Foster v. Davenport*, 63 U. S. (22 How.) 244; *Cutting v. Florida Railway and Navigation Co.*, 46 Fed. Repr. 641; *Leloup v. Port of Mobile*, 127 U. S. 640.)

In the *Leloup* case Bradley J. (at page 647), said: "But it is urged that a portion of the telegraph company's business *is internal to the State of Alabama*, and, therefore, taxable by the State. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation without the imposition of a tax which covers the entire operations of the company."

The case of *Crutcher v. Kentucky* (141 U. S. 47) has a very strong bearing in principle upon the question we are now considering. That case involved the transaction of certain business in the State of Kentucky by the plaintiff as the agent of the United States Express Company. Mr. Justice Bradley (at page 59) said: "We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business (which is to carry goods between different States), does also some local business *by carrying goods from one point to another within the State of Kentucky*. This is probably quite as much for the accommodation of the people of that State as for the advantage of the company. But whether so or not, it does not obviate the objection that the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such or not they operate as such. But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the State would be open to no such objection."

The case of *Maine v. Grand Trunk Railroad Co.* (142 U. S. 217) has no application to the case at bar. The defendant operated a portion of its line in the State of Maine and a franchise tax was imposed thereon. The payment was resisted on the ground that it was a tax imposed upon interstate commerce. The Supreme Court of the United States sustained this tax on the ground that the defendant enjoyed a franchise granted by the State of Maine, and it

was competent for the legislature to require the payment of taxes as a condition to issuing the grant. These facts clearly distinguish the case from the one now under consideration. It may be, however, remarked that the Supreme Court decided this case on a vote of five to four, and the opinion of the dissenting justices contains cogent reasoning in support of the proposition that the tax is imposed on the business of interstate commerce.

51 The case of *Coe v. Errol* (116 U. S. 517), cited by the respondent, has no application to the case at bar. That case involved the taxation of a raft of logs which had been cut in the State of New Hampshire, and were destined for shipment to the State of Maine. Prior to the time when they were to be started on their interstate journey, a tax was imposed by the State of New Hampshire, which was sustained by the Supreme Court of the United States, on the ground that until the transportation was actually begun these logs were like all other personal property in the State of New Hampshire and liable to taxation; that the mere intention of the owner when he cut these logs, to ship them into the State of Maine, would not be considered in determining the right of the State to tax the property.

The case of *People ex rel. N. Y. C. & H. R. R. R. Co. v. Morgan, comptroller* (168 N. Y. 1) has no bearing upon this controversy. In that case the comptroller sought to collect from the relator a tax under section 184 of the tax law, for the transportation of domestic mail matter within this State. It appeared, however, that it was impossible to ascertain the proportion of mail which originated and terminated within this State, as distinguished from interstate and foreign mail matter, for the reason that the mail bags could not be inspected for any such purpose. It was held that this state of affairs prevented the assessment of any tax for the transportation of domestic mail matter.

I am of opinion that the taxes imposed upon the relator by the State comptroller are an interference with interstate commerce, and were unconstitutionally levied and void.

The determination of the comptroller and the order of the appellate division should be reversed, with costs.

Parker, Ch. J., Gray, O'Brien, Haight and Werner, JJ., concur with Cullen, J.; Bartlett, J., dissents.

Order affirmed.

A copy.

EDWIN A. BEDELL,
State Reporter.

STATE OF NEW YORK,
County of Albany, Clerk's Office, } ss:

I, John Franey, clerk of the said county, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the annexed copy opinion with the original thereof, filed in this office on the 14th day of July

1902, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 14 day of July, 1902.

[Seal Albany County, July, 1847.]

JOHN FRANEY, *Clerk.*

52 At a special term of the supreme court of the State of New York, held at chambers of Mr. Justice Chester, in the city of Albany, on the 21st day of June, 1902, for the county of Albany.

Present: Honorable Alden Chester, justice.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* PENNSYLVANIA Railroad Company
against
ERASTUS C. KNIGHT, as Comptroller of the State of New York, Defendant.

The above-entitled cause having been taken to the court of appeals from an order of the appellate division, third department, entered and filed in the office of the clerk of said appellate division in the city of Albany on or about January 13th, 1902, affirming the determination of the comptroller in auditing and stating the account of the relator for the State franchise tax during the four years ending October 31st, 1900, at the sum of $2,356.61 and from the judgment thereon entered in the office of the clerk of the county of Albany on or about January 14th, 1902, upon said order of the appellate division affirming said determination of the comptroller and
53 adjudging that the defendant recover against the relator the sum of $98.59 and from every part of said order and judgment and the said court of appeals having rendered judgment in the cause on the 11th day of June, 1902, in all things affirming the judgment of said appellate division, further ordering that the record of said cause and that proceedings in the court of appeals be remitted to the supreme court to be enforced according to law and also further ordering that the defendant recover of the relator The Pennsylvania Railroad Company, the costs of appeal to said court of appeals,

Now, therefore, on reading and filing the said remittitur and on motion of John C. Davies, attorney general, of counsel for the defendant,

It is ordered and adjudged: that the judgment of the court of appeals be and the same hereby is made the judgment of this court and that the defendant have execution against the said Pennsylvania Railroad Company for the costs when adjusted by the clerk and inserted in this judgment.

ALDEN CHESTER, *J. S. C.*

STATE OF NEW YORK,
County of Albany, Clerk's Office, } ss:

I, John Franey, clerk of the said county, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the annexed copy order with the original thereof, filed in this office on the 21 day of June, 1902, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 14 day of July, 1902.

[Seal Albany County, July, 1847.]

JOHN FRANEY, *Clerk.*

54 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* PENNSYLVANIA Railroad Company
against
ERASTUS C. KNIGHT, as Comptroller of the State of New York, Defendant.

An order in this action having been made by the appellate division, third department, which order was entered in the office of the clerk of said appellate division in the city of Albany on or about January 13th, 1902, affirming the determination of the comptroller in auditing and stating the account of the relator for the State franchise tax for the four years ending October 31st, 1900, at the sum of $2,356.61, and judgment having been entered upon said order in the office of the clerk of the county of Albany on or about January 14th, 1902, affirming said determination of the comptroller and adjudging that the defendant recover from the relator the sum of $98.59 costs and an appeal having been taken by the relator from said order and judgment to the court of appeals and the said court of appeals having rendered judgment in this cause on the 11th day of June, 1902, in all things affirming said judgment of the appellate division and further ordering that the defendant recover from the relator
55 the costs of appeal to said court of appeals and further ordering that the record in said cause and proceeding in said court of appeals be remitted to the Supreme Court to be enforced according to law and the said court of appeals having ordered to be sent hither its remittitur by which it appears that the said court of appeals has affirmed said judgment of the appellate division in all things with costs and has given judgment accordingly and this court having by order entered herein on the 21st day of June, 1902, ordered that the said judgment of the court of appeals be made the judgment of this court with costs to be taxed by the clerk and inserted in this judgment,

Now, therefore, on motion of John C. Davies, attorney general, of counsel for the defendant,

It is adjudged: that the judgment of said court of appeals be, and

the same hereby is, made the judgment of this court and that the defendant have execution against the relator, Pennsylvania Railroad Company, for one hundred and thirty-four and $\frac{67}{100}$ dollars, costs and disbursements.

JOHN FRANEY, *Clerk.*

STATE OF NEW YORK, }
County of Albany, Clerk's Office, } *ss:*

I, John Franey, clerk of the said county, and also clerk of the supreme and county courts, being courts of record held therein, do hereby certify that I have compared the annexed copy judgment with the original thereof, filed in this office on the 21 day of June 1902, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 14 day of July, 1902.

[Seal Albany County, July, 1847.]

JOHN FRANEY, *Clerk.*

56 [Endorsed:] Book 80 page 21 Supreme court People *ex rel.* Pennsylvania R. R. Co. *vs.* E. C. Knight comptroller Copy order & judgment John C. Davies attorney general capitol Albany, N. Y. June 21st, 1902 11.50 a. m.

57 In the Supreme Court of the United States, October Term, 19—.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of the Pennsylvania Railroad Company
vs.
ERASTUS C. KNIGHT, as Comptroller of the State of New York. } No. —.

To the Honorable Joseph McKenna, justice of the Supreme Court of the United States:

The petition of the Pennsylvania Railroad Company respectfully shows:

That on the 21st day of June, A. D. 1902, the supreme court of the State of New York rendered a judgment in the third department thereof and in the county of Albany in the said State, against your petitioner in a certain cause wherein your petitioner The Pennsylvania Railroad Company was relator and plaintiff and the said Erastus C. Knight as comptroller of the State of New York was respondent and defendant, for the sum of $134.67 costs and disbursements, and awarded execution thereon, and likewise in and by said judgment affirmed the determination of the said comptroller of the State of New York in auditing and stating the account of
58 your petitioner for the State franchise tax of the State of New York for the four years ending October 31st, 1900 at the sum of $2,356.61, and likewise in and by said judgment made the judg-

ment of the court of appeals of the State of New York affirming said determination of said comptroller the judgment of said supreme court, as will appear by reference to the record and proceedings in said cause in said supreme court, which court is the highest court of said State of New York in which a decision and judgment in said suit could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under the statutes of the United States authorizing writs of error to State courts, to wit under section 709 of the Revised Statutes of the United States because said final judgment in said supreme court of the State of New York is repugnant to the Constitution of the United States; and because sections Nos. 182 and 184 of the tax law of the State of New York, under which said tax was levied and assessed, are invalid as to your petitioner, which is a corporation, not of the State of New York, to wit: a corporation of the State of Pennsylvania, but doing interstate business within the State of New York; and because said comptroller has under said sections of said tax law levied and exacted a license tax upon the right of your petitioner to transact business both interstate and domestic within the State of New York and his authority so to do has been upheld and the validity of said tax law in that respect sustained by the
59 said judgment; and because the said State franchise tax so levied upon and exacted from your petitioner and upheld and sustained by the said judgment is a tax upon the right of your petitioner to do business in the State of New York of an interstate character; and because such levying and exaction of said tax and such upholding and sustaining of the authority of the said comptroller under and pursuant to said statute to levy and exact the same is an attempted regulation by the State of New York of interstate commerce and in contravention of article 1, section 8, clause 3 of the Constitution of the United States, all of which appears by the record of the proceedings in said cause, which is herewith submitted.

Wherefore your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States and for a citation, and so it will ever pray, etc.

Dated July 10th 1902.

PENNSYLVANIA RAILROAD*ROAD* COMPANY,
By HENRY GALBRAITH WARD,
Its Attorney.

Allowed July 11th, 1902.
JOSEPH McKENNA,
Asso. Justice Supreme Court.

60 [Endorsed:] Supreme Court of the United States. People of the State of New York *ex rel.* Pennsylvania Railroad Company *vs.* Erastus C. Knight comptroller of the State of New York Copy petition for writ of error Stamped Albany county N. Y. Filed Jul- 18, 1902 Clerk's office Henry G. Ward att'y for pet'r.
6—385

61 Know all men by these presents: that we, The Pennsylvania Railroad Company as principal, and The United States Fidelity and Guaranty Company having an office and usual place of business at No. 140 Broadway, in the city of New York, as surety, are held and firmly bound unto Erastus C. Knight, as comptroller of the State of New York, in the full and just sum of seven hundred and fifty dollars ($750.00), to be paid to the said Erastus C. Knight, as comptroller as aforesaid, his certain attorney or successors, to which payment well and truly to be made we bind ourselves and our successors, jointly and severally by these presents.

Sealed with our seals, and dated this third day of July in the year one thousand nine hundred and two.

Whereas, lately, at a session of the supreme court of the State of New York, held in the third department thereof, and in the county of Albany in said State, in a suit or proceeding pending in said court between The People of the State of New York upon the relation of the Pennsylvania Railroad Company against said Erastus C. Knight as comptroller of the State of New York a final judgment was rendered against the said relator for, among other things, the sum of one hundred thirty-four $\frac{67}{100}$ dollars, costs and disbursements of said comptroller; and the said relator, The Pennsylvania Railroad Company, intending to obtain the allowance of a writ of error and to file a copy thereof in the clerk's office of the said court
62 to reverse the judgment in the aforesaid suit and proceeding, and a citation directed to the said Erastus C. Knight as comptroller of the State of New York, citing and admonishing him to be and appear at a Supreme Court of the United States at Washington within thirty days from the date thereof,—

Now, the condition of the above obligation is such, that if the said Pennsylvania Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs, if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE PENNSYLVANIA RAILROAD COMPANY,

[SEAL.] By JNO. P. GREEN, *Vice-President.*

Attest: A. J. COUNTY,
Ass't Secretary.

THE UNITED STATES FIDELITY & GUARANTY COMPANY,

[SEAL.] By SYLVESTER J. O'SULLIVAN, *Manager.*

Attest: G. TERRY SINCLAIR,
Attorney-in-Fact.

Allowed July 11th 1902.
JOSEPH McKENNA,
Ass. Justice Supreme Court U. S.

63 STATE OF NEW YORK, } ss:
County of New York, }

On the — day of ——, in the year 190–, before me personally came Sylvester J. O'Sullivan, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he was manager of the United States Fidelity and Guaranty Company, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3 of chapter 720 of the Session Laws of the State of New York for the Year 1893. And the said Sylvester J. O'Sullivan, further said that he was acquainted with G. Terry Sinclair, and knew him to be the attorney-in-fact of said company; that the signature of said G. Terry Sinclair, subscribed to the within instrument, is in the genuine handwriting of said G. Terry Sinclair, and was subscribed thereto by like order of the board of directors, and in the presence of him, the said Sylvester J. O'Sullivan.

JAMES P. WRIGHT,
Notary Public, Kings County.

Certificate filed — New York county.

At a regular meeting of the board of directors of the United States Fidelity and Guaranty Company, duly called and held on the eighth day of April, A. D. 1901, at the office of the company, in the city of Baltimore, State of Maryland, a quorum being present, on motion it was unanimously

Resolved—That Andrew Freedman, vice-president, or Sylvester J. O'Sullivan, manager, or G. Terry Sinclair, or Leonidas Dennis, attorneys-in-fact of this company in the State of New York, be and they hereby are, and each one of them is, authorized and empowered to execute and deliver and attach the seal of the company to any and all bonds and undertakings, for or on behalf of the company, in its business of guaranteeing the fidelity of persons holding places of public or private trust, and the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law required; such bonds and undertakings, however, to be attested in every instance by one other of the persons above named, as occasion may require.

STATE OF NEW YORK, } ss:
County of New York, }

I, G. Terry Sinclair, attorney-in-fact of the United States Fidelity and Guaranty Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of the said company, and do hereby certify that the same is a true and correct ransoript therefrom and of the whole of said resolution.

Given under my hand and the seal of the company, at the city of New York, this 3d day of July, 1902.

[SEAL.] G. TERRY SINCLAIR,
Attorney-in-Fact.

Statement of the United States Fidelity and Guaranty Company Rendered to the Department of Justice, Washington, D. C., at the Close of Business June 29, A. D. 1901.

Assets.		Liabilities.	
Investments, stocks and bonds (market value)..	$1,263,851.68	Capital stock paid in cash	$1,500,000.00
Loans on collateral.....	666,474.00	Cash deposited as collateral for risks.....	95,839.39
Cash on hand and in banks.....	200,373.72	Surplus and reserve	952,766.61
Real estate	135,417.64		
Loans on mortgages.....	325.00		
Mortgages and other collateral taken account salvage.....	45,818.09		
Agents' balances, less commissions fidelity and surety department	177,327.31		
Agents' balances, less commissions burglary department.....	18,975.89		
Due for subscriptions to department guaranteed attorneys.....	19,575.71		
Interest due and accrued.	20,466.96		
	$2,548,606.00		$2,548,606.00

STATE OF NEW YORK, }
County of New York, } *ss:*

G. Terry Sinclair, being duly sworn, says that he s the attorney-in-fact of the United States Fidelity and Guaranty Company, and that, to the best of his knowledge and belief, the foregoing is a true and correct statement of the financial condition of said company, as of June 29th, 1901, and that the financial condition of said company is as favorable now as it was when such statement was made.

G. TERRY SINCLAIR.

Subscribed and sworn to before me this 3 day of July, 1902.

JAMES P. WRIGHT,
Notary Public, Kings County.

Certificate filed — New York Co.

64 [Endorsed:] Pennsylvania Railroad Company and The United States Fidelity and Guaranty Company to Erastus C. Knight, comptroller of the State of New York. Penalty $750.00 Dated, July 3rd, 1902. Copy bond on writ of error. Stamped Albany county, N. Y. Filed Jul- 18, 1902 Clerk's office Henry G. Ward att'y for pet'r, 160 B'w'y, N. Y.

65 Supreme Court of the State of New York, Third Department, County of Albany.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of the Pennsylvania Railroad Company
vs.
ERASTUS C. KNIGHT, as Comptroller of the State of New York.

And now comes the above-named relator, The Pennsylvania Railroad Company, by its attorney Henry Galbraith Ward, and assigns for error in the final judgment herein and the proceedings or action above entitled,—

1st. That the court erred in awarding judgment and execution for the sum of $134.67 costs and disbursements against the said relator.

2d. That the court erred in affirming the determination of the comptroller of the State of New York in auditing and stating the account of said relator for the State franchise tax of the State of New York for the four years ending October 31st, 1900 at the sum of $2,356.61.

3d. That the court erred in not reversing and holding for naught said determination of said comptroller.

66 4th. That the court erred in not holding that said determination of said comptroller in levying, assessing and ascertaining said tax was repugnant to the Constitution of the United States and to article 1, section 1, clause 3 thereof.

5th. That the court erred in not holding that sections Nos. 182 and 184 of the tax law of the State of New York are as to the said relator invalid because repugnant to the said Constitution of the United States and said article 1, section 1, clause 3 thereof.

6th. That the court erred in not holding that said comptroller had in ascertaining, levying and assessing said franchise tax levied and exacted from the said relator a license tax upon its right to transact interstate business within the State of New York, and that said comptroller in so doing had acted unlawfully and in violation of said Constitution of the United States.

7th. That the court erred in upholding and sustaining the authority of said comptroller in levying, exacting, assessing or ascertaining any franchise tax under and pursuant to said tax law against the said relator, and that any franchise tax so levied, exacted, assessed or ascertained against said relator was unlawful and repugnant to the said Constitution of the United States.

July 10, 1902.

HENRY GALBRAITH WARD,
Att'y for the Pennsylvania Railroad Co.

67 [Endorsed :] Supreme Court of the United States. People of the State of New York *ex rel.* Pennsylvania Railroad Company *vs.* Erastus C. Knight, comptroller of the State of New York. Copy assignment of errors. Stamped Albany county, N. Y. Filed Jul- 18, 1902 Clerk's office. Henry G. Ward, att'y for pet'r.

68 STATE OF NEW YORK, } ss:
County of Albany, }

I, John Franey, clerk of said county and also clerk of the supreme court of the State of New York in and for the county of Albany, pursuant to a writ of error directed to the honorable the judges of the supreme court of the State of New York, which said writ was allowed by the Honorable Joseph McKenna, associate justice of the Supreme Court of the United States and signed by the clerk of said court on July 11th A. D. 1902, do hereby certify the writing hereto attached to be a true, complete and perfect copy of the record, and assignment of errors and of all proceedings in the case of The People of the State of New York on the relation of the Pennsylvania Railroad Company relator and Erastus C. Knight, as comptroller of the State of New York defendant, as fully as the same remain on file and of record in said case in my office.

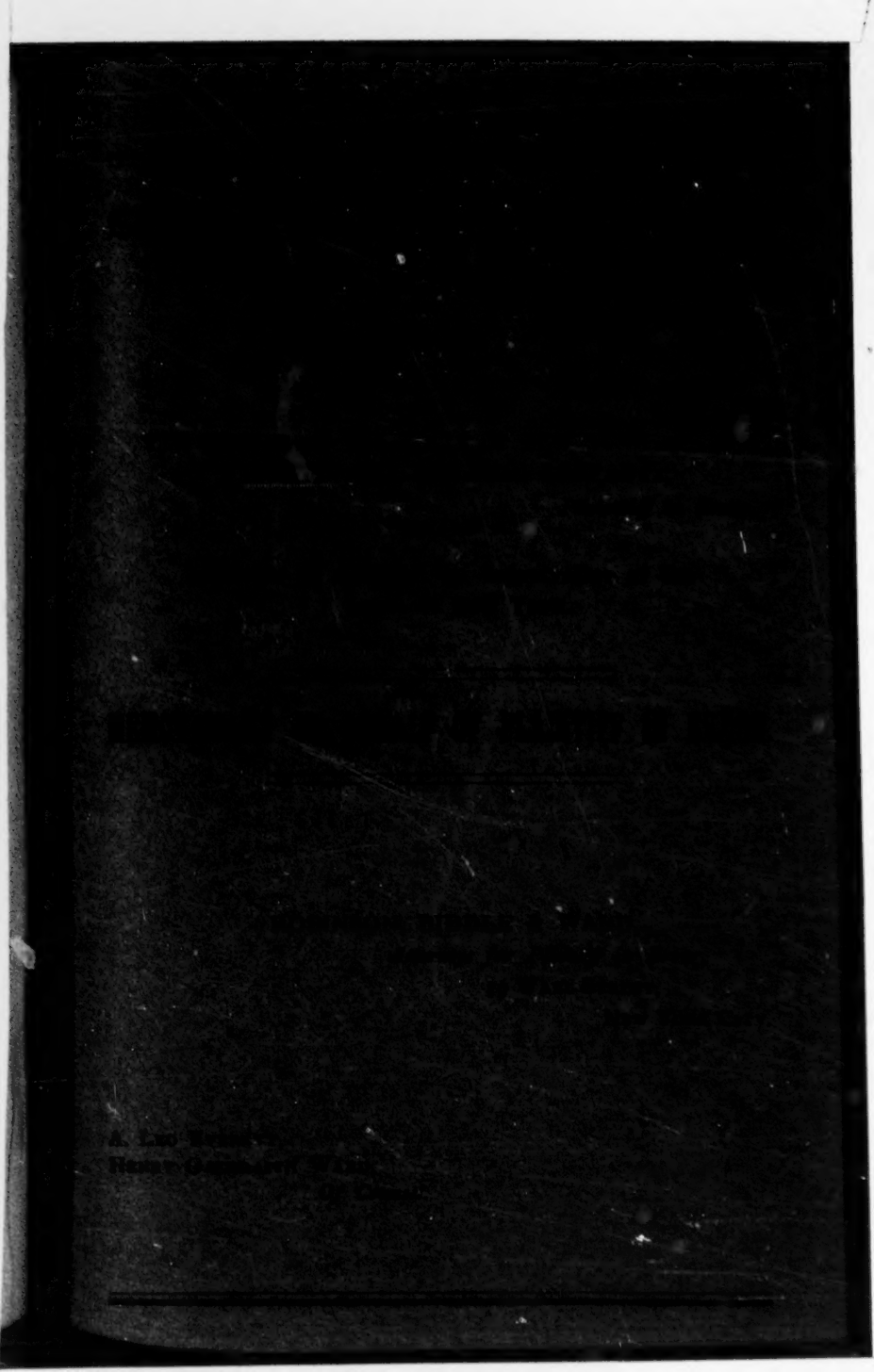
In witness whereof I hereunto subscribe my name and affix the seal of said court this 18th day of July A. D. 1902.

[Seal Albany County, July, 1847.]

JOHN FRANEY, *Clerk.*

[Endorsed:] U. S. Supreme Court People State of New York *ex rel.* Pennsylvania R. R. Co. relator *vs.* Erastus C. Knight comptroller State of New York Writ of error citation and return.

Endorsed on cover: File No. 18613. New York supreme court. Term No. 385. The People of the State of New York on the relation of the Pennsylvania Railroad Company, plaintiff in error, *vs.* Erastus C. Knight, comptroller of the State of New York. Filed July 22d, 1902.



Supreme Court of the United States.

OCTOBER TERM, 1903. No. 91.

The People of the State of New York *ex rel.* PENNSYLVANIA RAILROAD COMPANY,
Plaintiff in Error,

against

ERASTUS C. KNIGHT, as Comptroller of the State of New York.

MEMORANDUM ON BEHALF OF PLAINTIFF IN ERROR.

Statement of the Case.

This is a writ of error to the Supreme Court of the State of New York to review the judgment of that Court affirming the assessment by the Comptroller of the State of New York of certain taxes against the relator, the Pennsylvania Railroad Company, on the ground that they are invalid under the interstate commerce clause of the Constitution of the United States (Art. 1, Sec. 8, Subd. 3).

The assessments were made respectively under the authority of Sections 182 and 184 of Chapter 908 of the Laws of 1896 of the State of New York, known as the Tax Law, upon the privilege of conducting a business in the City of New York which consisted in operating a

certain number of cabs in connection with the relator's railroad and ferry system.

Section 182 is as follows (the material portion being in italics):

"*Franchise tax on corporations.*—Every corporation, joint stock company or association incorporated, organized or formed under, by or pursuant to law in this state, shall pay to the state treasurer annually an annual tax, to be computed upon the basis of the amount of its capital stock employed within this state, and upon each dollar of such amount, at the rate of one-quarter of a mill for each one per centum of dividends made and declared upon its capital stock during each year ending with the thirty-first day of October, if the dividends amount to six or more than six per centum upon the par value of such capital stock. If such dividend or dividends amount to less than six per centum on the par value of the capital stock, the tax shall be at the rate of one and one-half mills upon such portion of the capital stock at par as the amount of capital employed within this state bears to the entire capital of the corporation. If no dividend is made or declared, the tax shall be at the rate of one and one-half mills upon each dollar of the appraised capital employed within this state. If such corporation, joint stock company or association shall have more than one kind of capital stock, and upon one of such kinds of stock a dividend or dividends amounting to six or more than six per centum upon the par value thereof, has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-quarter of a mill for each one per centum of dividends made or declared upon the capital stock upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto a tax shall be charged at the rate of one and one-half mills upon every dollar of the valuation made

in accordance with the provisions of this act of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to six per centum; provided, however, that a street surface railroad corporation or a steam railroad corporation, or an elevated railroad corporation owning in a city a street surface railroad or an elevated railroad not operated by steam, in cases where the street surface roads or elevated roads of said owning corporations are operated by another street surface railroad corporation under a lease or otherwise, in so far as the dividends made and declared upon the capital stock of the said owning corporations shall be paid from the gross earnings of the said operating corporation in the form of rent or otherwise, shall only be required under this section to pay a tax of three per centum upon the dividends declared and paid from the moneys received in the form of rent or otherwise from the operating company in excess of four per centum upon the amount of its capital stock, provided, however, that nothing in this section shall relieve the said operating company of any of the liabilities imposed by section one hundred and eighty-five of this chapter. *Every corporation, joint stock company or association organized, incorporated or formed under the laws of any other state or country shall pay a like tax for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, to be computed upon the basis of the capital employed by it within this state.*"

Section 184 is as follows:

"*Additional franchise tax on transportation and transmission corporations and associations.*—Every corporation and joint-stock association formed for steam surface railroad, canal, steamboat, ferry, express, navigation, pipe-line, transfer, baggage, express, telegraph, telephone, palace car or sleeping-car purposes, and all other transportation corporations not liable to taxes under sections one hundred

and eighty-five or one hundred and eighty-six of this chapter, shall pay for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state an annual excise tax or license fee which shall be equal to five-tenths of one per centum upon its gross earnings within the state, which shall include its gross earnings from its transportation or transmission business originating and terminating within this state, but shall not include earnings derived from business of an interstate character. All settlements for such taxes heretofore based by the comptroller upon gross earnings, excluding earnings from interstate business, have been ratified and confirmed, except that the accounts for taxation under section six of chapter three hundred and sixty-one of the laws of eighteen hundred and eighty-one, for the years eighteen hundred and ninety-two and eighteen hundred and ninety-three, shall be settled and adjusted by the comptroller by excluding the earnings of an interstate character, as provided by this section."

The first attempt to tax the plaintiff in error on its cab business was in 1900. In that year the taxes were collected under Section 182 for the four years ending October 31st, 1900, amounting to $1,422.54, and under Section 184 for the same period, amounting to $934.07. They are the taxes involved in this proceeding.

Before the assessments were made the relator submitted to the Comptroller a sworn statement explaining the nature of the cab service, and claiming that it was exempt from taxation because it was an incident or part of the relator's system of interstate transportation (Affidavit of J. P. Green, pp. 10–11).

The Comptroller refused to make any revision of the assessments. The taxes were paid under protest, and the Pennsylvania Railroad Company thereupon obtained from the Supreme Court of the State of New York a writ of certiorari under Section 196 of the Tax Law to review his

determination. This writ was issued upon the petition of the Pennsylvania Railroad Company (pp. 7–9). The Comptroller made a return to the writ admitting all the allegations in the petition, and asserting that the taxes were legally and constitutionally imposed (p. 18). The petition and return constitute all the pleadings and evidence in the proceeding, which was first heard by the Appellate Division of the Supreme Court for the Third Department. That Court held the taxation to be valid and constitutional (pp. 21–24, s. c. *People* ex rel. *Pennsylvania Railroad Company* vs. *Knight*, 67 App. Div., p. 398).

An appeal was taken by the relator from this decision to the Court of Appeals, which affirmed the judgment below (pp. 25–37, s. c. *People* ex rel. *Pennsylvania Railroad Company* vs. *Knight*, 171 N. Y., 354).

The relator is a corporation of the State of Pennsylvania engaged in that State and others, including New York, New Jersey, Delaware and Maryland, in the carrying of mails, freight and passengers (Petition, p. 7).

Its terminus in New Jersey is at Jersey City, whence it conveys passengers and their baggage by ferryboats owned and operated by it to various points in the City of New York, viz.: Cortlandt Street, Desbrosses Street and 23d Street, North River (*Ibid*). Down to May, 1897, it confined itself in transporting passengers and their baggage to New York City to landing them at its ferry houses on the shore of the North River. With a view to facilitating the transportation of its passengers to and from their residences it established, on May 6th, 1897, a cab stand on its own premises at the 23d Street ferry, where it has since continuously maintained a service consisting of cabs and coaches, whose sole business has been to carry passengers and their baggage between the 23d Street ferry and points in the city (*Ibid*). Only persons who have used or are intending to use the ferry are allowed to

avail themselves of this service (Petition, pp. 7, 8, Circular, Exhibit F, pp. 13–15).

The relator argued in the courts below that upon this state of facts the cab service constituted interstate commerce, and was protected under Article 1, Section 8, Subdivision 3 of the United States Constitution relating to commerce.

The Court of Appeals (pp. 25–37, s. c. *People* ex rel. *Pennsylvania Railroad Company* vs. *Knight*, 171 N. Y., 354), held that the cab service was not interstate commerce, and that the taxes were properly imposed.

Assignments of Error.

1st. That the Court erred in awarding judgment and execution for the sum of $134.67 costs and disbursements against the said relator.

2d. That the Court erred in affirming the determination of the Comptroller of the State of New York in auditing and stating the account of said relator for the State franchise tax of the State of New York for the four years ending October 31st, 1900, at the sum of $2,356.61.

3d. That the Court erred in not reversing and holding for naught said determination of said Comptroller.

4th. That the Court erred in not holding that said determination of said Comptroller in levying, assessing and ascertaining said tax was repugnant to the Constitution of the United States and to article 1, section 1, clause 3 thereof.

5th. That the Court erred in not holding that sections Nos. 182 and 184 of the tax law of the State of New York are as to the said relator invalid because repugnant to the said Constitution of the United States and said article 1, section 1, clause 3 thereof.

6th. That the Court erred in not holding that said Comptroller had in ascertaining, levying and assessing said franchise tax levied and exacted from the said relator a license tax upon its right to transact interstate business within the State of New York, and that said Comptroller in so doing had acted unlawfully and in violation of said Constitution of the United States.

7th. That the Court erred in upholding and sustaining the authority of said Comptroller in levying, exacting, assessing or ascertaining any franchise tax under and pursuant to said tax law against the said relator, and that any franchise tax so levied, exacted, assessed or ascertained against said relator was unlawful and repugnant to the said Constitution of the United States (p. 45).

POINT I.

The taxes in question, being laid upon the privilege of doing business, are unconstitutional if that business is interstate commerce.

Sections 182 and 184 are alike in describing the tax as one payable by a corporation "for the privilege of exercising its corporate franchises [Domestic Corporations] or carrying on its business [Foreign Corporations]." The Court of Appeals of the State of New York has decided that the tax under Section 182 [at that time regulated by Ch. 542, L. 1880, and its amendments] was, as applied to foreign corporations, neither a property nor a franchise tax, but a tax on the privilege of doing business in the State.

People ex rel. Pennyslvania R.R. Co. vs. *Wemple*, 138 N. Y., 1.

That case arose before the relator established its cab business, and when it was engaged solely in taking and landing passengers and freight at the piers and ferries of New York City. The Court then held that the Company was exclusively engaged in interstate commerce, and that as the tax was upon that business, it was invalid.

The same must of course be true of the tax under Section 184.

The taxes cannot therefore be justified as if they were taxes upon property, or taxes upon a franchise regarded as part of the corporation's property, as in the following cases:

State Tax on Railway Gross Receipts, 15 Wall., 284.

Delaware Railroad Tax, 18 Wall., 206.

Telegraph Co. vs. *Texas*, 105 U. S., 460.

Western Union Tel. Co. vs. *Mass.*, 125 U. S., 530.

Pullman's Car Co. vs. *Pennsylvania*, 141 U. S., 18.

Maine vs. *Grand Trunk R'y.*, 142 U. S., 217.

Ficklen vs. *Shelby Co.*, 145 U. S., 1.

Ashley vs. *Ryan*, 153 U. S., 436.

Pittsburgh, etc., R'y. Co. vs. *Backus*, 154 U. S., 421.

Postal Telegraph Co. vs. *Adams*, 155 U. S., 688.

Hooper vs. *California*, 155 U. S., 648.

Erie R.R. Co. vs. *Pennsylvania*, 158 U. S., 431.

Western Union Tel. Co. vs. *Taggart*, 163 U. S., 1.

Adams Express Co. vs. *Ohio*, 165 U. S., 194.

American Refrigerating Co. vs. *Hall*, 174 U. S., 70.

Atlantic, &c., Telegraph Co. vs. *Philadelphia*, 190 U. S., 160.

Adopting the careful and exhaustive classification given in the case last cited, this case is in the category of those in which the tax has been held to be upon the privilege of engaging in commerce, as

Gloucester Ferry Co. vs. *Pennsylvania*, 114 U. S., 196.
Robbins vs. *Shelby Taxing District*, 120 U. S., 489.
Fargo vs. *Michigan*, 121 U. S., 230.
Phila. S.S. Co. vs. *Pennsylvania*, 122 U. S., 326.
Leloup vs. *Port of Mobile*, 127 U. S., 640.
Asher vs. *Texas*, 128 U. S., 129.
McCall vs. *California*, 136 U. S., 104.
Crutcher vs. *Kentucky*, 141 U. S., 47.

It follows, and indeed it is admitted by the Court of Appeals, that if the cab business is interstate commerce the taxes are invalid.

The only question, therefore, to be determined in this case is whether the relator's cab business is interstate commerce.

POINT II.

In the operation of its cab service the Pennsylvania Railroad Company is wholly engaged in interstate commerce.

In the first place we will consider the arguments advanced in support of the tax. These have been vigorously stated in an able opinion by Judge Cullen, representing the majority of the Judges in the Court of Appeals.

Less importance is attached by him to the real nature

of the service in which the railroad company is engaged than to the form of the agreement of hiring. The feature of the cab hire to which importance is attached are, that when upon entering the State a traveller uses one of these cabs he does not do so in pursuance of any contract previously made; conversely, that when driven to the ferry in a cab he is not under contract to continue his proposed journey out of the State; and that the cab fare in each case is paid separately from that paid for the transportation by rail.

A feature which the learned Judge ignores is that the rules of the company limit the service to the use of its railroad patrons, and that as the business is in itself unprofitable the company is interested in seeing that the rule is enforced. The use of the cabs by others could be obtained only by deceit.

The hire of the cabs being accomplished by a separate contract, the Court was of opinion that notwithstanding they might be used only by interstate travellers, the service was subject to local taxation just like that of the Elevated or surface cars or the public hacks. The argument of the Court is so firmly founded on this circumstance that had it appeared that the cabs were hired as a part of a through contract of transportation the case must have been decided the other way.

The Court did not appear to see that, while theoretically it would not be impossible for the Pennsylvania Railroad Company to sell through tickets including cab transportation, such a scheme would be quite impracticable in actual operation. Travellers leaving New York would have to buy their tickets in advance at a ticket agency, unless the cabmen were provided with a complete outfit of railroad tickets for every station on the Pennsylvania Railroad and its connections, covering the greater part of the United States. Persons coming to the city would have to exercise the forethought, before they

started, to buy tickets with coupons entitling them to cab transportation on their arrival. The ticket agents would have to be provided with tickets representing fares of different amounts, varying according to the distances from the ferry the traveller wishes to go, with which these agents would have to be familiar.

Disregarding these practical considerations the Court says:

> "If this cab service can in any way become part of interstate commerce (of which there may be some doubt, as I shall show by the authorities), I insist it can only be such when the service is rendered under an entire contract for continuous carriage to or from some point without the State."
>
> Per Cullen, *J.*, p. 27.

It has been pointed out how unfair such a test is in this case, because a through contract could not be applied to a cab service. If applied generally in transactions involving the carriage of persons and property its injustice would be far-reaching, because it regards the form of such transactions and not their substance. No ground of policy is alleged why this fictitious test should be resorted to. If it were impossible to find out whether in fact a carrier were engaged in an interstate transportation there might be some reason for applying it; but the facts in such cases are easily ascertainable, and in the case under discussion they are agreed upon. Having stated this doctrine, Cullen, *J.*, goes on to say:

> "It may be that there is no case in the Supreme Court of the United States which directly decides this proposition. But there is no authority to the contrary, and there are a number of cases in that Court which seem to recognize this as the true test of what transportation constitutes interstate commerce" (p. 27).

Had this Court thought proper to employ such a test, the cases of *Foster* vs. *Davenport*, 22 How., 244, and

Kelley vs. *Rhoads*, 188 U. S., 1 (which will be more fully discussed below), would have been decided differently. If we examine the cases cited by Judge Cullen we find that they fail to sustain his doctrine.

In *Cincinnati, New Orleans, etc., Ry. Co.*, vs. *Interstate Commerce Commission*, 162 U. S., 184, which was a prosecution instituted by the Interstate Commerce Commission, the Court had to consider whether the Georgia Railroad Company was doing an interstate business in accepting at its terminus in Georgia from a connecting, but independent, railroad, goods which had been shipped from another State, and which the Georgia Railroad Company undertook to transport to local points in Georgia. The Court found that inasmuch as the goods were shipped under through bills of lading the transportation was within the jurisdiction of the Interstate Commerce Commission. Had there been no through bill of lading, but merely an acceptance of goods by the Georgia Railroad under a new contract of carriage, a different question would have had to be considered. If the Georgia Railroad honestly, and without intent to evade the Interstate Commerce Law, confined itself to accepting goods for local traffic and made no arrangements for through transportation with the railroads to which it delivered or from which it received goods, it perhaps would not come within the jurisdiction of the Interstate Commerce Commission. It might be said that imported goods, when they reached the Georgia Railroad, would have lost their identity as subjects of interstate commerce, and would have become intermingled with the general mass of goods in the State of Georgia. They would at that point cease to be subject to Federal jurisdiction. So, conversely, goods would not acquire the character of exports until they left the Georgia Railroad (*Brown* vs. *Maryland*, 12 Wheat., 419).

L. & N. R.R. Co. vs. *Behlmer*, 175 U. S., 648, the other case cited, is in all respects similar to the first.

It was held that the existence of a through bill of lading between points in different States rendered all of the railroads engaged in the transportation subject to the Interstate Commerce Act, although some of them were situated wholly within the limits of a single State.

All that these two cases hold is that where there is a through contract there is interstate commerce. The doctrine for which Judge Cullen cites them, that where there is *not* a through contract there is *not* interstate commerce, is a radically different one, and was not involved in either case. The learned Judge, without making further reference to that doctrine, then discusses various cases in which interstate commerce has been treated of in other aspects, and relies especially upon these three.

Munn vs. *Illinois* (94 U. S., 113).
Coe vs. *Errol* (116 U. S., 517).
Detroit, etc., R'y Co. vs. *Interstate Commerce Commission*, 74 Fed. Rep., 803; 167 U. S., 633.

In *Munn* vs. *Illinois*, 64 U. S., 113, the State of Illinois enacted certain legislation respecting grain elevators, regulating the method of storage and the maximum charge for the service to be rendered by all elevators in the State.

The law was sustained as being an exercise of the police power of the State of Illinois. The language quoted by Judge Cullen (p. 28) is the single reference in an opinion some thirteen pages long to the subject of interstate commerce. The ground of the decision was that the public elevators of Illinois were affected by a public interest to such an extent that the State, in the exercise of its police power, had a right to regulate their charges. In the statement of facts preceding the Munn case is set forth Article 13 of the Constitution of Illinois, and also the Act of April 25th, 1871. An inspection of these will show that the elevators were treated as *storage* warehouses and not as

instruments of transportation, and a law regulating prices for *storage* was held to be an exercise of the police power and not a regulation of commerce.

In the passage referred to the Court pointed out particularly that the warehouses were used as instruments of domestic as well as of interstate commerce, and therefore, that incidentally they might become connected with interstate commerce, but not necessarily so. That argument indicates a distinction which can be applied to this case, because the cabs of the plaintiff in error are *always* used for interstate passengers, and being so used they are *necessarily* engaged in interstate commerce. The Court in *Munn* vs. *Illinois* could not have meant to imply that if the dray or cart which it mentions by way of illustration were employed solely to transfer grain which was in course of transportation from one State to another, the cartage would not have been interstate commerce. Certainly such a holding would have been inconsistent with *Foster* vs. *Davenport* (22 How., 244), and the "*Daniel Ball*" (10 Wall., 565).

What the Court meant was, that when an elevator handles domestic and foreign goods indiscriminately the latter lose their identity as foreign goods and become for all purposes of legislation domestic goods.

It is interesting to note that in a subsequent case Miller, *J.*, who was one of the majority of the Court in the *Munn* case, cited this very passage and extenuated it as far as he could, explaining that the question of the right of Congress to regulate commerce was really not before the Court:

> "Of the members of the Court who concurred in those opinions, there being two dissentients, but three remain, and the writer of this opinion is one of the three. He is prepared to take his share of the responsibility for the language used in those opinions, including the extracts above presented. He does not feel called upon to say whether those extracts justify

the decision of the Illinois Court in the present case. It will be seen, from the opinions themselves, and from the arguments of counsel presented in the reports, that the question did not receive any very elaborate consideration either in the opinions of the Court or in the arguments of counsel. And the question how far a charge made for a continuous transportation over several States, which included a State whose laws were in question, may be divided into separate charges for each State in enforcing the power of the State to regulate the fares of its railroads, was evidently not fully considered. These three cases, with others concerning the same subject, were argued at the same time by able counsel, and in relation to the different laws affecting the subject, of the States of Illinois, Iowa, Wisconsin and Minnesota; the main question in all the cases being the right of the State to establish any limitation upon the power of the railroad companies to fix the price at which they would carry passengers and freight. It was strenuously denied, and very confidently, by all the railroad companies, that any legislative body whatever had a right to limit the tolls and charges to be made by the carrying companies for transportation. And the great question to be decided, and which was decided, and which was argued in all those cases, was the right of the state within which a railroad company did business to regulate or limit the amount of any of these traffic charges.

"The importance of that question overshadowed all others; and the case of Munn *vs.* Illinois was selected by the Court as the most appropriate one in which to give its opinion on that subject, because that case presented the question of a private citizen, or unincorporated partnership, engaged in the warehousing business in Chicago, free from any claim of right or contract under an act of incorporation of any State whatever, and free from the question of continuous transporation through several States. And in that case the Court was presented with a question, which it decided, whether any one engaged in the public business, in which all the public had a right to re-

quire his service, could be regulated by acts of the Legislature in the exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services."

Wabash, etc., R'y Co. vs. *Illinois, 118 U.S., 557*, pp. 568–569.

The next case cited is *Coe* vs. *Errol*, 116 U. S., 517. There the State of New Hampshire assessed a tax on logs which had been drawn during the Winter from the forest and placed on the bank of a stream waiting to be floated down the Androscoggin River to the State of Maine. It was held that the taxation was constitutional. Judge Bradley, who delivered the opinion of the Court, said, "this was all preliminary work performed for the purpose of putting the property in a state of preparation and readiness for transportation." He says in another passage (p. 527):

"Goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey."

This definition of interstate commerce, so far from excluding the relator's cab service, seems exactly to cover it. Of course the phrase "continuous route or journey" does not negative the idea of a change of vehicle in the course of the journey. It means that if there is such a transfer it shall not be indefinitely delayed. (See *Kelley* vs. *Rhoads infra.*)

A passenger taking one of the relator's cabs to or from the ferry is engaged in a "continuous route or journey" in the sense used by Bradley, *J.*, because he continues his journey without any delay at all. What determined the Court to decide that the logs in *Coe* vs. *Errol* were not

engaged in a continuous journey was, not the absence of a through contract, but the fact that they lay all winter on the river bank.

In *Detroit, etc., R'y Co.* vs. *Interstate Commerce Commission* (74 F. R., 803; affirmed 167 U. S., 633), the question was whether a railroad by delivering merchandise to consignees at Grand Rapids at their doors without extra charge for cartage discriminated illegally against the town of Ionia, where free cartage was not included in the transportation. The prosecution was instituted under the Interstate Commerce Act. It was dismissed by the Circuit Court of Appeals on the ground that the subject was one over which the Interstate Commerce Commission had no jurisdiction.

That Court went out of its way to say that the cartage of property to and from freight yards was a subject over which Congress had no jurisdiction, and this is the point for which the case is cited by Judge Cullen.

This Court in affirming the decision was careful not to adopt the view of the Court below and merely held that all that Congress had in mind in enacting the section of Interstate Commerce Law in question was transportation by railroad. It did not hold that Congress could not have given the Interstate Commerce Commission jurisdiction of cartage if it had desired to.

> "We agree with the Circuit Court of Appeals in thinking that the fourth section of the Interstate Commerce Act has in view only the transportation of persons and property by rail, and that, when the passengers and property reached and were discharged from the cars at the company's warehouse or station at Grand Rapids, for the same charges as those received for similar service at Ionia, the duties and obligations cast upon this Company by the fourth section were fulfilled and satisfied. The subsequent history of the passengers and property, whether carried to their places of abode and of business by their own

vehicles or by those furnished by the railroad company, would not concern the Interstate Commerce Commission" (p. 644).

In view of this careful limitation of the doctrine of the case, the dictum of the Circuit Court of Appeals, so much relied on by Judge Cullen, is of doubtful authority.

The three cases may be thus summarized:

Munn vs. *Illinois* was not a case of taxation. It was decided on the ground that the legislation was a valid exercise of the police power. A suggestion that the elevator business was interstate commerce was dismissed on the ground that it involved domestic goods without distinction from foreign goods and therefore had not necessarily to do with interstate commerce.

Coe vs. *Errol* involved the taxation of goods which were deposited on a river bank months before transportation could begin.

Detroit, etc., R'y vs. *Commission* is only important for a dictum of the Circuit Court of Appeals which was not sustained by the Supreme Court.

No doubt it is difficult, as Mr. Justice Bradley said in *Coe* vs. *Errol*, to draw the line where domestic commerce ceases and interstate commerce begins. The true principle of distinction was declared by him in that case when he said that goods ceased to be a part of the general mass of property in the state "when they were shipped or entered with a common carrier for transportation to another state or had started upon such transportation *in a continuous route or journey.*"

Has not a passenger by one of the cabs of the Pennsylvania Railroad Company started in a continuous journey when he enters it at his home for the purpose of taking the ferry to New Jersey? The change of vehicle involved in getting off the cab and on to the ferry is certainly not such an interruption of travel as would make it any less a

continuous journey. The delay is only a few minutes. There is no more time lost or difficulty than in changing trains at a junction.

The plaintiff in error might well rest upon the decision in *Coe* vs. *Errol*, but the following cases may also be cited.

The *Daniel Ball*, 10 Wall., 557. The United States brought this action to recover a penalty for failure to have the vessel *Daniel Ball* licensed under the Act of Congress. It was propelled by steam and was engaged in navigating Grand River, Michigan, wholly within the limits of that State. Some of the goods carried by it, however, were destined to, and marked for, points beyond the State. It was held that the steamer, notwithstanding that it navigated wholly within the state, was engaged in the business of interstate commerce. The Court said:

> "She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress" (p. 565).

It is possible, as Judge Cullen says, that the decision in that case may be upheld on the ground that Congress has authority over transportation by navigable waters; still the case has been repeatedly held to be an authority as to what is interstate commerce, and the accuracy of the definition above quoted has never been questioned. It may sound strange to this Court to be told by the Court of Appeals of New York that that opinion has been overruled. (See *Wabash R'y Co.* vs. *Illinois*, 118

U. S., 557, 565; *Norfolk & Western R'y Co.* vs. *Pennsylvania*, 136 U. S., 114, 119.)

A law of the State of Alabama required owners of steamboats navigating the waters of the State to file a report in writing in an office of the State describing the ownership, name of vessel and other particulars. In another case (*Sinnot* vs. *Davenport*, 22 How., 227), it had been held that this act was unconstitutional as applied to vessels enrolled and licensed under the Act of Congress, and engaged in navigation between that State and other States. The question in this case was whether the same principle applied to a vessel not holding a Federal license, which was engaged in lightering goods to and from vessels anchored in the lower bay of Mobile entirely within the State of Alabama.

It was insisted by counsel that she was engaged exclusively in domestic trade or commerce, and consequently that the case could be distinguished from *Sinnot* vs. *Davenport*.

The Court held:

> "It is quite apparent, from the facts admitted in the case, that this steamboat was employed in aid of vessels engaged in the foreign or coastwise trade and commerce of the United States, either in the delivery of their cargoes, or in towing the vessels themselves to the port of Mobile. The character of the navigation and business in which it was employed cannot be distinguished from that in which the vessels it towed or unloaded were engaged. The lightering or towing was but the prolongation of the voyage of the vessels assisted to their port of destination."
>
> *Foster* vs. *Davenport*, 22 How., 244.

A statute of Iowa provided that no common carrier should transport from one point to another within the state any intoxicating liquors without having been furnished by the county auditor with a certificate that the

consignee was authorized to sell intoxicating liquors. A lot of liquor was shipped by rail from a point in Illinois consigned to William Horn, Brighton, Iowa. Upon its arrival at Brighton it was placed by the trainmen on the station platform, and afterwards the station agent moved it to the freight warehouse. For this act the station agent was convicted.

Held that

> "as the act for which the plaintiff in error was convicted, and which consisted in moving the goods from the platform to the freight house, was a part of the interstate commerce transportation, and was done before the law of Iowa could constitutionally attach to the goods, the conviction was erroneous."
>
> *Rhoades* vs. *Iowa*, 170 U. S., 412, 426.

An ordinance of Greenboro, North Carolina, required every person engaged in selling picture-frames and pictures, to pay a license tax of ten dollars per annum. A portrait company of Chicago, Illinois, sent an agent to Greensboro to deliver certain pictures and frames contracted to be sold to persons in Greenboro, and this required him to unpack the pictures and the frames (which were transported separately), put them together and deliver the framed pictures to the purchasers. It was held that the taxation of the business of such an agent was unconstitutional. The Court said (per Shiras, *J.*):

> "Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the de ivery."
>
> *Caldwell* vs. *North Carolina*, 187 U.S., 622, 632.

Another recent case is strongly in point. It shows also the ground upon which *Coe* vs. *Errol* was decided.

A herd of sheep were driven across the State of Wyoming from Utah to Nebraska for the purpose of being shipped by rail from a point in the last-named State. This point could have been reached without going through Wyoming. They were maintained by grazing along the route, and six to eight weeks were consumed in the journey.

The Court, in holding a State tax upon the sheep invalid, said:

> "The law upon this subject, so far as it concerns interference with interstate commerce, is settled by several cases in this Court, which hold that property actually in transit is exempt from local taxation, although if it be stored for an indefinite time during such transit, at least for other than natural causes, or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities (p.5). * * *
>
> The substance of these cases (after citing *Coe* vs. *Errol* and other cases) is that, while the property is at rest for an indefinite time awaiting transportation, or awaiting a sale at its place of destination, or at an intermediate point, it is subject to taxation. But if it be actually in transit to another State, it becomes the subject of interstate commerce and is exempt from local assessment (p. 7). * * *
>
> Bearing in mind that the weight of all the previous cases in this Court has been laid upon the fact of an indefinite delay, awaiting transportation at the commencement of the journey, or awaiting sale or delivery at its termination, the facts of this case fail completely to bring it within those authorities" (p. 8).

Kelley vs. *Rhoads*, 188 U. S., 1.

In a case decided at the same term as the last this Court found the facts to be within the decision of *Coe* vs. *Errol*, because the lumber which was the subject of the State tax was lying on the bank of the Ontonagon River awaiting shipment, and the case was stronger for the State because

a good deal more lumber had been collected than could be floated down in one season.

Diamond Match Co. vs. *Ontonagon*, 188 U.S., 82.

It may be noticed in connection with that case that the Court disposes of the contention of Cullen, *J.* (p. 29), that transportation by land differs in principle from transportation by water.

> "Was the transit interstate commerce? We agree with counsel that it is unimportant in determining an answer whether the transit was by water or by railroad, or both water and railroad" (p. 92).

These decisions show that the Court does not employ any arbitrary tests or distinctions, which may be good for one case but not for another, but investigates each one upon its facts, and if the transportation is interstate commerce in point of fact (though no contract is made for through transportation) it will be protected from State interference.

We see the same regard for the substance rather than form of the transaction in

Cutting vs. *Florida R'y & Nav. Co.*, 46 F. R., 641.

Galveston, etc., Ry. vs. *Armstrong* (*Tex*), 43 S. W. R., 614.

State vs. *Gulf, Col. & S. F. Ry. Co.*, (*Tex*)., 44 S. W. R., 542.

In those three cases the Courts in determining whether a shipment was subject to the rates established by the State railroad law or those of the Interstate Commerce Commission, had regard, not to whether there was a *contract* of interstate transportation, but to whether the goods were really going forward from one state to another in a continuous journey.

The suggestion of the Court of Appeals that in the absence of a contract a passenger might change his mind and go home when he reached the ferry merits but brief consideration. Such a proceeding on the part of intending passengers would be so infrequent a departure from the general course of business that it cannot affect its real nature. The suggestion might with equal force have been made in *Foster* vs. *Davenport* (supra), and *Kelley* vs. *Rhoads* (supra), but would hardly have changed the result in either case. Nor would a contract, if there were one, prevent a passenger changing his mind and going home if he so desired.

The suggestion that a friend might accompany a *bona fide* traveller to the ferry, without proceeding further, seems somewhat trivial. If it be necessary to answer it, it can be said that this is an ordinary incident of interstate transportation.

We may notice here another argument pressed by the Court of Appeals. On pp. 26, 27 it is said that if the Pennsylvania Railroad Cab Service is to be free from State control, so also is the public hack in the City of New York, so far as trips to ferries on the North River are concerned. This argument ignores the fact that the cab service of the plaintiff in error is *wholly* for the use of interstate passengers, while the public hack is for general use, local as well as interstate. The employment of the public hackman in interstate commerce is occasional, and merely incidental to his general business. The same considerations apply to the elevated and surface railroads. It is not true of either of these agencies, as it is of the plaintiff in error's cab service, that it is intended solely for interstate business.

How far the plaintiff in error would be subject to state taxation, if it did a local business in addition to carrying interstate passengers, is a different question, which ought not to embarrass the decision of this case. The Court of

Appeals, however, felt that if the Pennsylvania Railroad Company's business was exempt from taxation, difficulties would arise in the case of other railroads, as, for instance, the New York Central. This Company maintains a cab service which is used by its patrons travelling to and from points within the State as well as out of it.

An answer to this difficulty is found in the case of *Brown* vs. *Maryland*, 12 Wheat., 419, where it was held that the business of selling imported goods was exempt from State interference so long as they had not become mixed up with the general mass of property in the State. The same principle must be true of persons. The passenger in a cab of the New York Central Railroad is mixed up with the mass of persons in the State, because the cab can be used for all travellers. A passenger in a Pennsylvania Railroad cab is in a channel of transportation not available to the general mass of persons in the State, but only to those entering and leaving it.

An answer may also be found in a class of cases of which *Pullman* vs. *Adams*, 189 U. S., 420, and *Osborne* vs. *Florida*, 164 U. S., 650, are examples, where it is held that, if a company doing interstate business chooses to do local business as well, it cannot complain if a privilege tax be imposed on it for doing business generally.

The decision of the Court of Appeals is founded on a narrow and technical consideration of the issue involved. The question is a very simple one: Is the relator wholly engaged in interstate commerce? In order to answer it the Court set up a formal and arbitrary test, which is plainly not of universal application, and found against the Company because it did not conform to it. Had it preferred instead to inquire what was the real nature of the business, the Court would have seen that it consisted solely in transporting interstate travellers, and, if words

are to be used in their ordinary sense, this is interstate commerce.

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9485

SUPREME COURT OF THE UNITED STATES.

THE PEOPLE OF THE STATE OF NEW YORK ON THE RELATION OF THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

against

ERASTUS C. KNIGHT, Comptroller of the State of New York.

Brief for defendant in error.

STATEMENT.

Error to the Court of Appeals of the State of New York to review its judgment in affirming a judgment of the Appellate Division of the Supreme Court of that State, which affirmed the decision of the Comptroller of New York State in imposing a tax upon the plaintiff in error for exercising its corporate franchises within that State.

The tax was levied pursuant to provisions of the Tax Laws of the State, hereafter quoted in full, and the single question involved is whether the business of the plaintiff in operating cabs and carriages for hire between points entirely within the State of New York, is interstate commerce and therefore exempt from tax.

The plaintiff in error is a railroad company organized and existing under the laws of the State of Pennsylvania. It operates extensive lines of railroads, of which the eastern terminus is in Jersey City, in the State of New Jersey. It transports freight and passengers across the Hudson river between Jersey City and New York City by public ferry boats. The landings on the New York shore of these boats are at different points in the city of New York. In the vicinity of

one of these landings, at Twenty-third street in New York City, the plaintiff in 1897, established a carriage and cab stand where, to quote the language of their circular, "An agent of the cab service will be found at the cab stand who will see that all orders for vehicles are promptly filled and that patrons are courteously and satisfactorily served." (Page 13, Record.)

It is also said: Orders are also received from any point within the city of New York "by telephone from persons desiring cabs or omnibuses to carry them to the Twenty-third Street station."

It will thus be seen that all orders for cabs, which come, are received at the cab stand and all orders for cabs are received which come from any part of the city. These orders may come from persons who have traveled over the plaintiff's railroad, but not necessarily so as the service is public and any person crossing the ferry or who happens to be upon the street may engage these cabs and so too, any person in any part of the city who desires to go to the vicinity of the cab stand, but who does not contemplate riding on the railroad of the plaintiff or even going to Jersey City across the Hudson, may engage this cab service.

It is conceded that the charges for such cab service are entirely separate from the charges for transportation on the railroad lines of the plaintiff in error, and also, that such services are performed between points entirely within the State of New York. (Pages 8 to 9 of Record, folios 11 to 12.) In fact, the contract for cab service is in terms limited to transportation within the city. (See pages 11 to 15, including map on page 15 of Record.)

The franchise tax laws of the State, under which the tax in question was assessed, are as follows:

> "§ 182. Franchise tax on corporations.—Every cor-
> "poration, joint stock company or association incor-
> "porated, organized or formed under, by or pursuant
> "to law in this State, shall pay to the State Treasurer
> "annually, an annual tax to be computed upon the
> "basis of the amount of its capital stock employed
> "within this State and upon each dollar of such
> "amount, at the rate of one-quarter of a mill for each

"one per centum of dividends made and declared "upon its capital stock during each year ending with "the thirty-first day of October, if the dividends "amount to six or more than six per centum upon "the par value of such capital stock. If such divi- "dend or dividends amount to less than six per cen- "tum on the par value of the capital stock, the tax "shall be at the rate of one and one-half mills upon "such portion of the capital stock at par as the "amount of capital employed within this State bears "to the entire capital of the corporation. If no divi- "dend is made or declared, the tax shall be at the "rate of one and one-half mills upon each dollar of "the appraised capital employed within the State. If "such corporation, joint stock company or association "shall have more than one kind of capital stock, and "upon one of such kinds of stock a dividend or divi- "dends amounting to six, or more than six per cen- "tum, upon the par value thereof, has been made or "declared, and upon the other no dividend has been "made or declared, or the dividend or dividends made "or declared thereon, amount to less than six per "centum upon the par value thereof, then the tax "shall be at the rate of one-quarter of a mill for each "one per centum of dividends made or declared upon "the capital stock upon the par value of which the "dividend or dividends made or declared amount to "six or more than six per centum, and in addition "thereto a tax shall be charged at the rate of one and "one-half mills upon every dollar of the valuation "made in accordance with the provisions of this act "of the capital stock upon which no dividend was "made or declared, or upon the par value of which "the dividend or dividends made or declared did not "amount to six per centum; provided, however, that "a street surface railroad corporation or a steam rail- "road corporation, or an elevated railroad corpora- "tion owning in a city a street surface railroad or "an elevated railroad not operated by steam, in cases "where the street surface roads or elevated roads of

"said owning corporations are operated by another "street surface railroad corporation under a lease or "otherwise, in so far as the dividends made and de- "clared upon the capital stock of the said owning "corporations shall be paid from the gross earnings "of the said operating corporation in the form of rent "or otherwise, shall only be required under this sec- "tion to pay a tax of three per centum upon the divi- "dends declared and paid from the moneys received "in the form of rent or otherwise from the operating "company in excess of four per centum upon the "amount of its capital stock, provided, however, that "nothing in this section shall relieve the said operat- "ing company of any of the liabilities imposed by "section one hundred and eighty-five of this chapter. "Every corporation, joint stock company or associ- "ation organized, incorporated or formed under the "laws of any other State or country, shall pay a like "tax for the privilege of exercising its corporate fran- "chise or carrying on its business in such corporate "or organized capacity in this State, to be computed "upon the basis of the capital employed by it within "this State."

"§ 184. Additional franchise tax on transporta- "tion and transmission corporations and associ- "ations.—Every corporation and joint stock associ- "ation formed for steam surface railroad, canal, "steamboat, ferry, express, navigation, pipe-line, "transfer, baggage express, telegraph, telephone, "palace car or sleeping car purposes, and all other "transportation corporations not liable to taxes "under sections one hundred and eighty-five or one "hundred and eighty-six of this chapter, shall pay "for the privilege of exercising its corporate fran- "chises or carrying on its business in such corporate "or organized capacity in this State, an annual excise "tax or license fee which shall be equal to five-tenths "of one per centum upon its gross earnings within "this State, which shall include its gross earnings "from its transportation or transmission business

"originating and terminating within this State, but "shall not include earnings derived from business of "an interstate character. All settlements for such "taxes heretofore based by the comptroller upon "gross earnings excluding earnings from interstate "business, have been ratified and confirmed, except "that the accounts for taxation under section six of "chapter three hundred and sixty-one of the laws of "eighteen hundred and eighty-one, for the years eigh- "teen hundred and ninety-two and eighteen hundred "and ninety-three, shall be settled and adjusted by "the comptroller by excluding the earnings of an in- "terstate character as provided by this section."

Acting under the provisions of the foregoing sections, the defendant in error, as Comptroller of the State of New York, imposed a tax upon the plaintiff in error for the four years ending October 31, 1900, to the amount of $2,356.61. It is further provided by section 195 of the said tax law, that any person or corporation claiming to be aggrieved by the imposition of a tax by the Comptroller may make application for a rehearing, and by section 196 the decision of the Comptroller upon such rehearing may be reviewed by certiorari. The plaintiff in error applied to the Comptroller for such rehearing, which was granted, and thereupon the defendant in error made a determination declining to reduce or cancel the tax so imposed by him. The plaintiff in error brought a proceeding by certiorari in the Supreme Court of the State of New York to review that decision, which was heard in the first instance at the Appellate Division of that court, in and for the Third Department. The Appellate Division confirmed the decision of the Comptroller, and the plaintiff appealed therefrom to the Court of Appeals of said State.

On the 10th day of June, 1902, the Court of Appeals filed a decision affirming the order of the Appellate Division.

To review the judgment entered thereon the plaintiff in error sues out this writ upon the ground that the provisions of the Tax Law hereinbefore quoted are, as to the relator, in contravention of the Constitution of the United States, as laying a tax upon its business of an interstate character.

POINTS.

I

The cab service maintained in the city of New York by the plaintiff in error is not interstate commerce, and the tax imposed upon it is valid.

The case at bar falls within the principle announced in Coe vs. Errol, 116 U. S., 517. There logs which had been cut in the State of Maine with others which had been cut in the State of New Hampshire were floated down a stream in New Hampshire to the town of Errol, in that State; they were destined to be floated thence down the Androscoggin River to the State of Maine. A tax was assessed upon them by the town of Errol for county, town, school and highway purposes. The Supreme Court of New Hampshire sustained the tax as to the logs cut in that State, and abated it as to those cut in Maine. Upon error to this court the judgment of the Supreme Court of New Hampshire was affirmed. Mr. Justice Bradley in delivering the opinion of the court said at pages 524, 525, 526, 527 and 528:

> "The question for us to consider, therefore, is, "whether the products of a State (in this case timber "cut in its forests) are liable to be taxed like other "property within the State, though intended for "exportation to another State, and partially prepared "for that purpose by being deposited at a place of "shipment, such products being owned by persons "residing in another State." * * * *
>
> "Are the products of a State, though intended for "exportation to another State, and partially prepared "for that purpose by being deposited at a place or "port of shipment within the State, liable to be "taxed like other property within the State?
>
> "Do the owner's state of mind in relation to the "goods, that is, his intent to export them, and his "partial preparation to do so, exempt them from "taxation? This is the precise question for "solution." * * * * * *

"There must be a point of time when they cease "to be governed exclusively by the domestic law "and begin to be governed and protected by the "national law of commercial regulation, and that "moment seems to us to be a legitimate one for this "purpose, in which they commence their final move- "ment for transportation from the State of their "origin to that of their destination. When the "products of the farm or the forest are collected and "brought in from the surrounding country to a town "or station serving as an entrepôt for that particular "region, whether on a river or a line of railroad, "such products are not yet exports, nor are they in "process of exportation, nor is exportation begun "until they are committed to the common carrier for "transportation out of the State to the State of their "destination, or have started on their ultimate pas- "sage to that State. Until then it is reasonable to "regard them as not only within the State of their "origin, but as a part of the general mass of prop- "erty of that State, subject to its jurisdiction, and "liable to taxation there, if not taxed by reason of "their being intended for exportation, but taxed "without any discrimination, in the usual way and "manner in which such property is taxed in the "State." * * * * * * *

"Though intended for exportation, they may never "be exported; the owner has a perfect right to "change his mind; and until actually put in motion, "for some place out of the State, or committed to the "custody of a carrier for transportation to such place, "why may they not be regarded as still remaining a "part of the general mass of property in the "State?" * * * * * * *

"But no definite rule has been adopted with regard "to the point of time at which the taxing power of "the State ceases as to goods exported to a foreign "country or to another State. What we have already "said, however, in relation to the products of a State "intended for exportation to another State will indi-

"cate the view which seems to us the sound one on "that subject, namely, that such goods do not cease "to be a part of the general mass of property in the "State, subject, as such, to its jurisdiction, and to "taxation in the usual way, until they have been "shipped, or entered with a common carrier for "transportation to another State, or have been "started upon such transportation in a continuous "route or journey." * * * * * *

"It is true, it was said in the case of *The Daniel* "*Ball*, 10 Wall. 557, 565: 'Whenever a commodity "'has begun to move as an article of trade from one "'State to another, commerce in that commodity be-"'tween the States has commenced.' But this move-"ment does not begin until the articles have been "shipped or started for transportation from the one "State to the other. The carrying of them in carts or "other vehicles, or even floating them, to the depot "where the journey is to commence is no part of that "journey. That is all preliminary work, performed for "the purpose of putting the property in a state of prep-"aration and readiness for transportation. Until "actually launched on its way to another State, or "committed to a common carrier for transportation "to such State, its destination is not fixed and cer-"tain. It may be sold or otherwise disposed of within "the State, and never put in course of transportation "out of the State. Carrying it from the farm, or the "forest, to the depot, is only an interior movement "of the property, entirely within the State, for the "purpose, it is true, but only for the purpose, of put-"ting it into a course of exportation; it is no part "of the exportation itself. Until shipped or started "on its final journey out of the State its exportation "is a matter altogether *in fie. i*, and not at all a fixed "and certain thing."

The doctrine of Coe vs. Errol was approved and followed by this court in Diamond Match Company vs. Ontonagon, 188

U. S., 82, and in commenting upon it Mr. Justice McKenna said at page 96:

> "In further specialization of these propositions we "may say that the cases establish that there may be "an interior movement of property which does not "constitute interstate commerce, though property "come from or be destined to another State. In the "one case, though it have not reached its place "of disembarkation or delivery, it may be taxed. "*Brown v. Houston*, 114 U. S., 662. In the other "case, until it be shipped or started on its final "journey, it may be taxed. *Coe v. Errol*, 116 U. S., "617."

What difference in principle can there be between the transportation of persons and the transportation of property in determining whether either constitutes interstate commerce? If the business of carrying merchandise to a railroad station, where it is to be shipped to another State, is not interstate commerce, how can the carrying of passengers from their homes to such station for the purpose of taking passage to another State be so considered? Is every drayman who hauls freight for shipment to another State to the stations of the plaintiff in error engaged in interstate commerce? Is every cabman who conveys passengers to the Twenty-third Street station of the plaintiff in error engaged in interstate commerce?

Could not a corporation organized in New York State, and which performed exclusively the same service as that involved here, be taxed by the State upon the receipts of that business? If the business conducted by others would not be interstate commerce, then it is not so, because conducted by the plaintiff in error. As was said by Judge Cullen, in this case: "Therefore, it is the character of the service, not the character of the carrier, that determines whether transportation is interstate commerce or not."

The cases cited upon the brief for the plaintiff in error do not tend to establish a different principle and may be easily distinguished from the case at bar.

The case of *The Daniel Ball*, 10 Wall. 557, has already been sufficiently commented upon in the citations from Coe v. Errol, supra, and Diamond Match Company v. Antonagon, 188 U. S., 82. The cases cited for plaintiff in error are all ably and exhaustively analyzed in the opinion of the Court of Appeals, in this case, written by Judge Cullen. (Pages 25-31 of Record.)

II

The judgment should be affirmed.

John Cunneen

Attorney General of the State of New York, Attorney for Defendant in error.

Supreme Court of the United States.

No. 91.—October Term, 1903.

The People of the State of New York on the relation of The Pennsylvania Railroad Company, Plaintiff in Error,
vs.
Erastus C. Knight, Comptroller of the State of New York.

In error to the Supreme Court of the State of New York.

[January 4, 1904.]

This is a writ of error to the Supreme Court of the State of New York to review a judgment of that court affirming the assessment by the Comptroller of the State of New York of a certain tax against the relator, The Pennsylvania Railroad Company. The contention of the plaintiff in error is that the tax, which is a franchise tax imposed under appropriate statutes of New York upon the company for carrying on the business of running cabs and carriages for hire between points entirely within the State of New York, is invalid under the interstate commerce clause of the Constitution of the United States, article I, section 8, subdivision 3.

The facts are undisputed. In 1897 the company established a cab stand on its own premises at the Twenty-third street ferry in the city of New York, and has since maintained a service of cabs and coaches under special licenses from the city of New York, whereby they can stand on those premises only. The sole business done by those cabs and coaches is to bring the company's passengers to and from the Twenty-third street ferry. The charges for this service are separate from those of the company for further transportation, and no part of its receipts from the cab service is received as compensation for any service outside the State of New York. As a separate business, this cab service has not been profitable to the company, but has been operated at a loss. The validity of this tax was sustained both by the Supreme Court and the Court of Appeals of New York. (67 App. Div. 398; 171 N. Y. 354.)

Mr. Justice Brewer delivered the opinion of the Court.

The contention of the company is that this cab service is merely an extension and therefore a part of its interstate transportation; that it is not carrying on a cab business generally in the city of New York, but is merely furnishing the service to those who seek to take over its lines some interstate transportation, thus commencing the transportation from their

houses instead of from the ferry landing, or like service to those who have already received such interstate transportation, thus completing the transportation to their places of destination; that the character of the business remains unchanged, although individuals may avail themselves of this service who do not intend or have not received any interstate transportation, for they who thus use the service do so wrongfully and against the wish of the company. In other words, the company, to promote its general business, seeks only to complete the continuous transportation of interstate passengers to or from their residences or hotels in New York city instead of commencing and ending such transportation at the ferry landing at Twenty-third street; the character of the service depends not on the action of the passenger, but on the purpose of the company in providing it, and the omission to include the charge for the cab service in the charges for other transportation arises from the practical difficulty of making such inclusion, and does not alter the fact that such cab service is a part of the interstate transportation.

To hold the even balance between the Nation and the States in the exercise of their respective powers and rights, always difficult, is becoming more so through the growing complexity of social life, and business conditions. Into many relations and transactions there enter elements of a National as well as those of a State character, and to determine in a given case which elements dominate and assign the relation or transaction to the control of the Nation or of the State, is often most perplexing. And this case fully illustrates the perplexities.

It is true that a passenger over the Pennsylvania Railroad to the city of New York does not in one sense fully complete his journey when he reaches the ferry landing on the New York side, but only when he is delivered at his temporary or permanent stopping place in the city. Looking at it from this standpoint the company's cab service is simply one element in a continuous interstate transportation, and as such would be excluded from State and be subject to National control. The State may not tax for the privilege of doing an interstate commerce business. (*Atlantic & Pacific Telegraph Company* v. *Philadelphia*, 190 U. S. 160.) On the other hand, the cab service is exclusively rendered within the limits of the city. It is contracted and paid for independently of any contract or payment for strictly interstate transportation. The party receiving it owes no legal duty of crossing the State line.

Undoubtedly, a single act of carriage or transportation wholly within a State may be part of a continuous interstate carriage or transportation. Goods shipped from Albany to Philadelphia may be carried by the New York Central Railroad only within the limits of New York, and yet that service is in interstate carriage. By reason thereof the Nation regulates that carriage, including the part performed by the New York company.

But it does not follow therefrom that the New York company is wholly relieved from State regulation and State taxation, for a part of its work is carriage and transportation begun and ended within the State. So the Pennsylvania company, which is engaged largely in interstate transportation, is amenable to State regulation and State taxation as to any of its service, which is wholly performed within the State and not as a part of interstate transportation. Wherever a separation in fact exists between transportation service wholly within the State and that between the States a like separation may be recognized between the control of the State and that of the Nation. (*Osborne* v. *Florida*, 164 U. S. 650; *Pullman Co.* v. *Adams*, 189 U. S. 420.)

As we have seen, the cab service is rendered wholly within the State and has no contractual or necessary relation to interstate transportation. It is either preliminary or subsequent thereto. It is independently contracted for, and not necessarily connected therewith. But when service is wholly within a State, it is presumably subject to State control. The burden is on him who asserts that, though actually within, it is legally outside the State; and unless the interstate character is established, locality determines the question of jurisdiction. *Coe* v. *Errol*, (116 U. S. 517,) though not in all respects similar, is very closely in point. In that case spruce logs had been drawn down from Wentworth's Location in New Hampshire, and placed in Clear Stream, also in New Hampshire, to be from thence floated down the Androscoggin River to the State of Maine, there to be manufactured and sold. After they had thus been drawn down and placed in Clear Stream, a tax was imposed upon them by the State of New Hampshire. The validity of that tax was challenged on the ground that the logs were in process of transportation from Wentworth's location in New Hampshire to the State of Maine. It was sustained by the Supreme Court of New Hampshire, and also by this court. In the course of the opinion of Mr. Justice Bradley are these pertinent observations (p. 528):

"It is true, it was said in the case of *The Daniel Ball*, (10 Wall. 557, 565): 'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm, or the forest, to the depot, is only an interior movement of

the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing."

Diamond Match Company v. *Ontonagon*, (188 U. S. 82;) *Detroit &c. Railway Company* v. *Interstate Commerce Commission*, (21 C. C. A. 103; 43 U. S. App. 308; 167 U. S. 633.)

As shown in the opinion from which we have just quoted, many things have more or less close relation to interstate commerce, which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed?

We are of opinion that the cab service is an independent local service, preliminary or subsequent to any interstate transportation, and therefore the judgment of the Supreme Court of the State of New York was correct, and it is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.